

# OFFICE COPY

## TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

\_\_\_\_\_  
No. 848  
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JOHN F. FIXA, INDIVIDUALLY AND AS POST-  
MASTER, SAN FRANCISCO, CALIFORNIA, ET  
AL., APPELLANTS,

vs.

LEIF HEILBERG

\_\_\_\_\_  
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

\_\_\_\_\_  
FILED JANUARY 19, 1965

PROBABLE JURISDICTION NOTED FEBRUARY 1, 1965

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[fol. 1] [File endorsement omitted]

Marshall W. Krause  
Staff Counsel  
American Civil Liberties Union  
of Northern California  
503 Market Street  
San Francisco 5, California  
EXbrook 2-4692,  
Attorney for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF CALIFORNIA,  
SOUTHERN DIVISION.**

No. 41660

**Action for Injunctive and Declaratory Relief  
Three Judge Court Requested**

**LEIF HEILBERG and MARSHALL W. KRAUSE, Plaintiffs,**

**v.**

**JOHN F. FIXA, individually and as Postmaster, San Francisco, California; J. EDWARD DAY, individually and as Postmaster General of the United States; GEORGE BROKAW, individually and as Collector of Customs, San Francisco, California; DOUGLAS DILLON, individually and as Secretary of the Treasury of the United States, Defendants.**

**COMPLAINT—Filed July 30, 1963**

**Plaintiff Heilberg for a cause of action alleges:**

**I**

That this is a suit for declaratory relief and to enjoin the enforcement of 39 U.S.C. § 4008 [Pub. L. 87-793] regulating the mailing of "communist political propaganda." Said statute is set out as "Exhibit A" attached hereto. This Court has jurisdiction over the subject matter thereof and the defendants herein under 28 U.S.C. §§ 1339, 1346,

1356, 1391 (e), 2201, 2202, Article III, Section 2 of the Constitution of the United States, and the First and Fifth Amendments to the Constitution of the United States.

## II

There now exists an actual justiciable controversy be- [fol. 2] tween plaintiff, who is a resident of this judicial district, and defendants concerning the receipt and mailing of "communist political propaganda." Plaintiff, as further described below, will suffer immediate and irreparable injury if the relief prayed for is not granted.

## III

The defendants, and each of them, in their captioned official capacities are charged with the enforcement of the provisions of 39 U.S.C. § 4008 by the terms of the statute itself or, as to defendants Fixa and Brokaw, by the orders, regulations and instructions of their superiors, and have enforced and threaten to continue to enforce said law in the manner hereinafter described even though, for the reasons hereinafter described, said law is void and unconstitutional.

## IV

On or about July 12, 1963, plaintiff Leif Heilberg received a letter through the United States mail from the defendant Fixa on a card marked POD Form 2153-X containing the following message:

### Message to Addressee

This office is holding unsealed mail matter addressed to you from a foreign country. Under Public Law 87-793, the Secretary of the Treasury has determined this mail to be Communist political propaganda. It cannot be delivered to you unless you have subscribed to it, or otherwise want it. Please check the appropriate spaces under "Instructions" on this card and return the card. If your reply is not received by the date indicated, it will be assumed that you do not want to receive the publication(s) listed, or any similar publication. This mail will then be destroyed.

Postmaster.



Said card further stated that the mail matter addressed to plaintiff Heilberg being detained was "A Proposal Concerning The General Line of the International Communist Movement." Said card further provided four boxes for the addressee to check and return the card to defendant Fixa as follows:

Deliver: — this publication  
 — similar publication

Do Not Deliver: — this publication  
 — similar publication

[fol. 3] Said card further stated that unless a reply from addressee was received by August 2, 1963, said detained mail matter will be destroyed. A photograph of this card is attached to this complaint as Exhibit B and incorporated herein. Plaintiff has not returned said card.

## V

Plaintiff Heilberg did not order said detained matter; however, he desires to receive this piece of mail and all mail addressed to him in the regular course of the post without said mail being delayed, labeled, read, screened, passed, detained, destroyed, or otherwise processed pursuant to the terms of 39 U.S.C. §4008.

## VI

Plaintiff is informed and believes and on this basis alleges that one or more of the defendants maintains a list or card file of those persons who signify a willingness to have delivered to them "Communist political propaganda" and that if plaintiff signifies a willingness to accept the material described in Paragraph IV, above, or similar publications that his name will be added to said list. Plaintiff does not wish to have his name on any list of persons signifying a willingness to accept "Communist political propaganda" because the presence of his name on such a list will unfavorably and unfairly stigmatize him as a person who desires to have Communist propaganda sent to him and therefore might be in the category of persons considered disloyal to the United States of America, "soft on communism", weak-minded, and other derogatory categories

all to his embarrassment and damage to his reputation and ability to earn a livelihood.

## VII

Plaintiff further alleges that his right to privacy of person and political opinion and his freedom of speech and association under the First Amendment are abridged by 39 U.S.C. § 4008 since he must either lose his right to receive unsolicited mail matter which the defendants or any of them decide falls within the restrictions of 39 U.S.C. § 4008, or he must allow his name to be placed on the list mentioned in paragraph VI, above. The use of said list is [fol. 4] not restricted in any manner by law but is available to all persons, law enforcement agencies, Congressional committees, government agencies, and newspapers and other public information media. Plaintiff alleges that if he allows his name to be added to said list he will be subjected to investigation, intimidation, public notoriety, all in violation of his rights to privacy and freedom of association.

## VIII

Unless restrained by this court the defendants will destroy the copy of "A Proposal Concerning The General Line of the International Communist Movement" if a reply to POD Form 2153-X is not received by August 2, 1963. Unless enjoined to do so by this court defendants will not deliver said literature to plaintiff unless he requests delivery and complies with the requirements of 39 U.S.C. § 4008.

Plaintiff Marshall W. Krause for a cause of action alleges:

## IX

Paragraphs I, II and III, above, are hereby realleged as if set out here in full.

## X

Plaintiff Marshall W. Krause has in his possession a copy of the magazine entitled "Peking Review," dated June 21, 1963 and numbered Volume VI, No. 25. Said magazine is subtitled "A Weekly Magazine of Chinese News and Views" and is published weekly by Peking Re-



view, *Pai Wan Chuang*, Peking (37), China. Said magazine is edited, printed and published in the People's Republic of China and the particular copy in the possession of plaintiff was mailed to him at his request by the publisher from Peking, China.

## XI

Plaintiff is informed and believes and on this basis alleges that the defendants in this action have determined pursuant to authority granted them by 39 U.S.C. § 4008 [see Exhibit A attached hereto] that each and every issue of the *Peking Review* is "communist political propaganda" subject to the detention provisions of said statute and not addressed for delivery pursuant to a reciprocal cultural [fol. 5] international agreement.

## XII

Plaintiff Marshall W. Krause has in his possession a copy of *The New York Times Western Edition* dated July 5, 1963. Said publication is a newspaper of general circulation in the western portion of the United States of America and is published and edited in New York, New York and printed in Los Angeles, California. Said copy of the *New York Times Western Edition* contains therein at pages 4, 5 and 6 an article which is therein stated to be the complete text of a letter sent on June 14, 1963 by the Central Committee of the Chinese Communist Party to the Central Committee of the Communist Party of the Soviet Union as printed in English in the Chinese weekly *Peking Review*. Said letter of June 14, 1963 is printed in the June 21, 1963 edition of the *Peking Review* described in paragraph X above.

## XIII

Said copy of the *New York Times Western Edition* contains matter, to wit the letter reprinted from the *Peking Review* of June 21, 1963, which defendants have determined pursuant to authority granted them by 39 U.S.C. § 4008 to be "communist political propaganda" subject to the detention provisions of said statute.

## XIV

Plaintiff desires to deposit, unsealed, in the United States Mail his copies of the *Peking Review* for June 21, 1963 and the *New York Times Western Edition* for July 5, 1963. Plaintiff desires to deposit said mail unsealed because the postage fee required for unsealed mail containing only newspapers or periodicals is substantially less than the postage fee required for sealed mail of the same weight. Plaintiff wishes to address the copies of said publications to a friend residing in the United States who has not indicated a desire for said publications, does not subscribe to said publications, and is not a United States Government agency, public library, college, university, graduate school, scientific or professional institution for advanced studies, or any official thereof. Plaintiff wishes to endorse said [fol. 6] mail with his name and address so that he is known as the sender thereof.

## XV

Plaintiff has refrained from depositing said periodicals in the United States Mail in accordance with his desires for the sole reason that pursuant to 39 U.S.C. § 4008 the defendants herein threaten to and will detain said mail and notify the addressee that he has been sent "communist political propaganda." Plaintiff does not wish to be identified by an agency or official of the United States Government as a sender of "communist political propaganda" for the following reasons:

1. Such identification tends to create political hostility which is embarrassing to plaintiff and may cause him to be shunned or suspected to be disloyal to his government.

2. Such identification is political censorship of plaintiff's mail.

3. Such identification may prejudice the mind of the addressee of said materials so that he may not agree to receive them or may not read them, both to the detriment of plaintiff's right to freely communicate with other persons.

Further, plaintiff does not wish his mail detained and delayed in its delivery because an agency of the government has decided that it is "communist political propa-

ganda." Plaintiff is informed and believes and on this basis alleges that mail detained under the provisions of 39 U.S.C. § 4008 is delayed for periods of from one day to several weeks.

### Allegations of Unconstitutionality by Both Plaintiffs

#### XVI

39 U.S.C. § 4008 is unconstitutional and void on its face and said fact should be declared by the judgment of this court and the defendants herein perpetually enjoined from [fol. 7] enforcing its provisions for the following reasons:

1. It violates plaintiff's rights to freedom of speech, press, association and privacy as protected by the First Amendment to the Constitution of the United States.

2. It deprives plaintiff Leif Heilberg of due process of law under the Fifth Amendment to the Constitution of the United States because the exemption of officials of United States Government agencies, public libraries, colleges, universities, graduate schools, scientific or professional institutions for advanced studies is an arbitrary classification discriminating against him and categorizing him into a group assumed to be less able to distinguish propaganda than other persons similarly situated as to ability, education and political understanding.

3. It violates the due process clause of the Fifth Amendment to the Constitution of the United States because the standards for the determination of what is "communist political propaganda" are vague, uncertain, and do not provide the opportunity for notice or hearing.

#### XVII

Plaintiffs have no adequate remedy at law to protect them from the effects of said defendants enforcing 39 U.S.C. § 4008 and will suffer irreparable injury unless their rights are declared and they are granted injunctive relief as prayed below.

Wherefore, plaintiffs pray:

1. For a temporary restraining order restraining defendants and each of them from destroying or dis-

posing of the written matter entitled "A Proposal Concerning the General Line of the International Communist Movement" now in the possession of defendant Fixa;

2. For a judgment declaring that plaintiff Leif Heil- [fol. 8] berg has the right to receive any and all mail addressed to him in the regular course of the post without said mail being processed pursuant to the terms of 39 U.S.C. § 4008;

3. For a judgment declaring that plaintiff Marshall W. Krause has the right to deposit any and all mail in the United States Mail subject to the laws and regulations governing the same but without said mail being processed pursuant to the terms of 39 U.S.C. § 4008;

4. For the convening of a three judge court and the entry of judgment by that court permanently enjoining defendants and their agents from enforcing or executing the provisions of 39 U.S.C. § 4008 on the basis that said statute is in conflict with the Constitution of the United States;

5. For costs of suit herein and other and further relief as shall be just and proper.

/s/ Marshall W. Krause, Attorney for Plaintiffs.

Date: July 30, 1963.

[fol. 9]

#### EXHIBIT A TO COMPLAINT

§ 4008. Communist political propaganda.

"(a) Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda', shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which

is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

“(b) For the purposes of this section, the term ‘communist political propaganda’ means political propaganda, as defined in section 1 (j) of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611 (j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620 (f) of the Foreign Assistance Act of 1961, as amended.

“(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not ‘communist political propaganda’ addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for delivery in any country described in subsection (b).”

[Vol. 10]

## EXHIBIT B TO COMPLAINT

A 2896

## INSTRUCTIONS

Aug. 2, 1963

(Date)

## DELIVER

☐ THIS PUBLICATION☐ SIMILAR PUBLICATION

## DO NOT DELIVER

☐ THIS PUBLICATION☐ SIMILAR PUBLICATION

"A Proposal Concerning The General  
Line of The International Communist  
Movement" 1963, 1 copy

## MESSAGE TO ADDRESSEE

This office is holding unsealed mail matter addressed to you from a foreign country. Under Public Law 87-733, the Secretary of the Treasury has determined this mail to be Communist political propaganda. It cannot be delivered to you unless you have subscribed to it, or otherwise want it. Please check the appropriate spaces under "Instructions" on this card and return the card. If your reply is not received by the date indicated, it will be assumed that you do not want to receive the publication(s) listed, or any similar publication. This mail will then be destroyed.

(Detach Here)

Leif Heilberg  
1801 Page Street  
San Francisco 17, Calif.

Postmaster



[fol. 11] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

No. 41660

~~MOTION FOR ORDER GRANTING PRELIMINARY INJUNCTION—~~  
Filed July 31, 1963

To Cecil F. Poole, United States Attorney and attorney  
for each of the above defendants:

You will please take notice that on Friday, August 2, 1963, at 9:45 A.M. in the Law and Motion courtroom of the above court, plaintiff Leif Heilberg, by his attorney, will move for an order granting a preliminary injunction against the defendant Fixa and his agents and subordinates in the form attached hereto restraining and enjoining during the pendency of this action said defendant from destroying or otherwise disposing of a certain document entitled "A Proposal Concerning the General Line of the International Communist Movement" now in the possession of defendant Fixa and his agents and subordinates. Said motion will be based upon the memorandum of au-[fols. 12-14] thorities filed herewith, the complaint filed in the above action, the affidavit of counsel filed herewith, and such additional matter, oral or documentary, as shall be presented at the hearing on said motion.

Date: July 31, 1963

/s/ Marshal W. Krause, Attorney for Plaintiffs.

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Acknowledgment of service (omitted in printing.)



[fol. 15] ATTACHMENT TO MOTION FOR ORDER GRANTING  
PRELIMINARY INJUNCTION—Filed July 31, 1963

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

LEIF HEILBERG and MARSHALL W. KRAUSE, Plaintiffs,

v.

JOHN F. FIXA, individually and as Postmaster, San Francisco, California; J. EDWARD DAY, individually and as Postmaster General of the United States; GEORGE BROOKAW, individually and as Collector of Customs, San Francisco, California; DOUGLAS DILLON, individually and as Secretary of the Treasury of the United States, Defendants.

Affidavit of Counsel

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

Marshall W. Krause declares and says:

That he is the attorney for plaintiff Leif Heilberg in the above action.

That he has in his possession the original of the letter on POD Form 2153-X attached to the complaint herein as "Exhibit B" and that defendant Fixa therein threatens to destroy a certain document, to wit: "A Proposal Concerning the General Line of the International Communist Movement," unless plaintiff Heilberg completes said form and returns it to defendant Fixa by August 2, 1963, and indicates thereon that he wishes to receive "Communist political propaganda."

That unless defendant Fixa is enjoined during the pendency [fol. 16] of this action from carrying out said threatened destruction, the subject matter of the above action as to the plaintiff Heilberg will be destroyed and there will be no way to test the legality of the defendants' actions in implementing 39 USC 4008.

That affiant believes that 39 USC 4008 is unconstitutional.

tional and threatens to abridge plaintiff's rights under the First and Fifth Amendments to the United States Constitution.

Dated: July 31, 1963

Marshall W. Krause.

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

On this 31st day of July in the year one thousand nine hundred and sixty three before me, Maude W. Nash, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Marshall W. Krause known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the City and County of San Francisco the day and year in this certificate first above written.

Maude W. Nash, Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires October 14, 1966.

[fol. 17] [File endorsement omitted].

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Before: Honorable Lloyd H. Burke

No. 41660

LEIF HEILBERG and MARSHALL W. KRAUSE, Plaintiffs,

VS.

JOHN F. FIXA, ET AL., Defendants.

**Transcript of Hearing on Motion for Order Granting Preliminary (Temporary) Injunction (Restraining Order)—  
Friday, August 2, 1963.**

[fol. 18] APPEARANCES:

Marshall W. Krause, Staff Counsel, American Civil Liberties Union of Northern California on behalf of Plaintiffs.

Charles Elmer Collett, Assistant United States Attorney on behalf of Defendants.

[fol. 19] Proceedings

The Clerk: Leif Heilberg, et al, versus John F. Fixa.

Mr. Krause: Marshall Krause for the moving party,  
Your Honor.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: At this point is there any particular problem as to what should be done? I have contacted the Chief Judge of the Circuit Court through his secretary, and he is in Denver and will not be back until Monday for the purpose of designating the member of the Court of Appeals and another District Court Judge.

Mr. Collett: I would assume, Your Honor, that you have made some sort of a determination in your own mind that there is a substantial issue presented here which requires you to request the appointment of a three-judge court.

The Court: I think the issue is substantial enough to require we convene—

Mr. Collett: Is Mr. Heilberg here?

Mr. Krause: Yes, Mr. Heilberg is here.

Mr. Collett: Will you have him come forward, please.

Mr. Krause: I do not understand—

Mr. Collett: Will you have him come forward.

The Court: Mr. Collett, if you have anything to say, [fol. 20] you direct it to the Court.

Mr. Collett: Yes, Your Honor.

I call Your Honor's attention to the complaint which is filed. Paragraph 5. Mr. Heilberg desires to receive this piece of mail so I— At this time I hand the letter to him—

Mr. Krause: I do not think—

Mr. Collett: —in accordance with the Section that is involved here, 4008 of Title 39 which determines that if he desires the article which is involved, why, the Postmaster may deliver it to him.

The Court: To what part of the complaint did you refer?

Mr. Collett: Paragraph 5 on page 3.

Mr. Krause: If we could read that, Your Honor. May I read it? Plaintiff Heilberg—

The Court: I can read.

All right.

Mr. Krause: May I call your attention to the last phrase in that paragraph.

“... without said mail being delayed, labeled, read, screened, passed, detained, destroyed, or otherwise processed pursuant to the terms of 39 U.S.C. 4008.”

Mr. Collett is attempting to tell us that he can avoid any [fol. 21] test of this particular statute merely by delivering the material involved any time someone files suit. If this were allowed to continue, Your Honor, Mr. Heilberg would have to file suit every time he receives a piece of mail from a country pursuant to the terms of this statute, whose mail is foreign propaganda. This is an intolerable situation and I do not think that the Court should stand for this sort of thing because it means that this particular legislation could never be tested as to its validity.

The Court: As I recall, the statutory requirement of the

application of the declaratory relief is that there must be an actual controversy either pending or in existence.

Now, where is the controversy here except your interest in finding a vehicle for determination of the constitutional issue?

Mr. Krause: The actual controversy is the constitutional issue. If the issue can be avoided, it means that we are faced with a multiplicity of suits. If we have to dismiss our suit any time that the mail is delivered—I think you can see, Your Honor, that it absolutely prevents any test of this statute which I do not think—

The Court: It may be that you can get a test of the statute but you may have to get it through a case which [fol. 22] arrives in a different posture.

Mr. Krause: Let me also say this: We have alleged in the complaint that the authorities here, the post office and the customs department, maintain a list of persons who are willing to receive Communist political propaganda. We have alleged that the existence of this list is a threat to the personal liberties of the plaintiff, Mr. Heilberg, because his name on that list may subject him to violations of his privacy by having his name linked with persons wishing to receive Communist political propaganda resulting in derogatory consequences such as being considered sympathetic to Communism just because your name is on this list, being subjected to investigations, being called before committees. This list, which we are prepared to prove the existence of, is a justiciable controversy, regardless of whether the mail is here or not. And I would add to that, Your Honor, that we have asked for a declaration of the invalidity of the particular statute which would come up whether we are dealing with one particular piece of mail or the future delivery of mail. I do not think that the government can avoid a test of this legislation merely by delivering the piece of mail when suit is filed because, then, they consider that to be a request under the statute and this is the very statute we are trying [fol. 23] to test the validity of.

The Court: I do not think there is any illusion on the part of anyone as to what your intention is. The question is whether or not this action may stand at this time under these circumstances.

We will take a short recess at this point.

(Recess taken.)

[fol. 24] The Clerk: Leif Heilberg, et al, versus Fixa.

The Court: Gentlemen, this matter comes before me this morning on the basis of an order shortening time which is signed by Judge Sweigert on the basis of the affidavit indicating the possibility of irreparable harm or injury.

Is there any question at this point insofar as the temporary restraining order is concerned since the subject matter of the action described in the complaint and in the affidavit is no longer in the possession of the postal authorities and, therefore, not susceptible to destruction. As far as the temporary order is concerned, the matter is moot.

Mr. Krause: Yes, Your Honor, I would like to raise the point—

Mr. Collett: Well, yes, what?

The Court: Mr. Collett.

Mr. Collett: Is he saying yes he is agreeing—

The Court: Let him state his position.

Mr. Krause: Thank you, Your Honor.

The material in question, as far as I know, is not in our possession because we do not accept any attempt to give it to us because it is processed, Your Honor, according [fol. 25] to the terms of the statute which we claim to be unconstitutional.

The Court: Will you tell me how this Court can undo what has already been done if what you say is correct by way of a temporary restraining order? I cannot say I am restraining what you have already done, Mr. Fixa.

Mr. Krause: It is this: The subject matter of this suit, it is true, is the particular piece of mail.

The Court: Just a moment, now. All we are talking about now is the purpose of the hearing this morning which is to determine whether or not I can with propriety under the provisions of Title 28 issue a temporary restraining order. Now, whether or not there is or is not merit to the action from the standpoint of the complaint is a matter which can be disposed of at some other time.

Mr. Krause: I understand that, Your Honor. The point



that I wish to make here is that the restraining order can issue an order to preserve the subject matter of the suit which, if it does not exist, there will be no suit.

Certainly, the next step here, as I think we can all comprehend, is for the United States Attorney to come in and move for summary judgment on the basis the suit is moot and the motion has some merit to it. I am not saying that it will be granted, but it certainly has some merit to it. [fol. 26] And I think Your Honor can take notice of the fact that this is what is going to happen.

To present the subject of the suit, Your Honor, we do not accept this piece of mail. Mr. Fixa cannot get rid of it by merely throwing it out on the street. That is precisely what the subject of this restraining order is.

The Court: The subject of this hearing is whether or not a temporary restraining order is necessary to preserve the status of the parties and preserve the property in question pending a determination as to the validity of the claim of unconstitutionality by a three-Judge Court.

Now, this morning it is apparently conceded that the subject matter of a temporary restraining order is no longer in the possession of the government.

Mr. Krause: No, sir, I do not concede that. I beg to differ with you. It is true that Mr. Collett has brought in a package. I do not know what it contains. I do not know whether it is the subject matter of this litigation, Your Honor. He just then tried to foist it off on us, but we have not accepted it, Your Honor. It is as if Mr. Fixa would throw it out of the window and say: I don't have it anymore.

The preliminary injunction is to restrain him from de-[fol. 27] stroying it and disposing of it. It seems to me he is attempting to dispose of it right now in Court.

The Court: Your client says he wants it and he won't sign the necessary forms according to the statute. The government has relinquished it. I do not say that disposes of the question as to whether or not the action dies with that disposition. I have serious doubt as to whether it does. At any rate, that is not the question which can be disposed of at this hearing. That would be disposed of on appropriate motion with proper notice of the hearing. 284 says that at least five days notice of the hearing shall be given to the Attorney General of the United States,



the United States Attorney for the District and such other persons who may be defendants.

Although I make no pretense of having peculiar experience in this type of action, I am not sure that you can name the Secretary of Treasury and the Postmaster in this District.

Isn't there some provision that applies to this type of action?

Mr. Collett: There has been a new section, Your Honor, which is cited in his first paragraph, 1291, I believe it is, which permits service upon the Postmaster General by certified mail and the action may be filed in the District where the—

[fol. 28] The Court: How about the Secretary of Treasury?

Mr. Krause: 1391(e), Your Honor.

Mr. Collett: Excuse me, Mr. Krause.

There is no question Your Honor is right, that 1294—1284 has not been complied with here. It is necessary to give five days notice to the Attorney General of the United States and the offices of the United States which are named. Now, Your Honor has used the expression temporary restraining order. Actually, this is not an application for a temporary restraining order. It is an application for a preliminary injunction, and a preliminary injunction is pending the disposition of the ultimate issues. And that cannot be determined by this Court, it has to be determined by a three-judge court if there is anything to be presented to a three-judge court.

The Court: The motion does properly refer to a preliminary injunction but I do not think there is any question from reading the affidavit and the motion in its entirety that this was intended to be a motion designed to give relief in the form of a temporary restraining order pending a hearing on the preliminary injunction.

Mr. Collett: It does not say that. It says during the pendency of this action. These are the words he used. That is what it says and I do not see how it can be construed to be anything else. There is no ambiguity about [fol. 29] it. It says during the pendency of this action. It is an application for an interlocutory or an injunction pending—

The Court: I think there is sufficient allegation of pro-

spective injury, not in the serious sense, but at least there was the allegation that the mail would be destroyed today absent of some action by the Court.

My view is that under these circumstances the order shortening time produces nothing in the way of a basis for a temporary restraining action by this Court. It just goes on the regular calendar. I think the three-judge court would have to hear the motion. I do not think there is anything to do this morning.

Mr. Krause: Let me say this, Your Honor: that the time limits on this thing are very stringent. The person who is the recipient of the mail gets 20-days notice that it is being held awaiting his instructions on the card sent. Now, by the time the recipient of the mail gets to an attorney and the attorney can figure out what can happen and the suit can be filed the time is very short and that is why I got an order shortening time. The allegation is, according to the official information given by the post office department, that this piece of mail will be destroyed unless something is done today. Today is the last day on which something can be done. Under these rather extraordinary circumstances, it is not inappropriate to get an order shortening time, it is not inappropriate for the Court to hear the matter on its merits.

The Court: I cannot hear it on its merits. The only thing I can do at this point is to preserve the subject matter of the litigation.

Mr. Krause: Yes, that is what I mean, the merits of the motion, not the merits of the lawsuit.

The Court: Now the motion has no merits because there is nothing in danger.

Mr. Krause: We are still suffering the same detriment, however.

The Court: Isn't that the thrust of your original complaint? It has nothing to do with this particular item of property.

Mr. Krause: Only if you assume, Your Honor, that this material is now in the possession of the plaintiff, which I do not assume, and I do not understand how you can assume it.

The Court: Because it has been offered to him and it was made available to him with absolutely no conditions imposed. If you can offer evidence to support the propo-

sition that what the government has made available here and say they have got something else, then, we can con-[fol. 31] tinue with the hearing, but I assume there is no question as to the good faith in the representations, by government counsel that this is the material to which your motion is directed.

Mr. Collett: Will the Court have Mr. Krause either say that it is or is not at this time.

Let's not have any fooling around. Let's not play games here. It was given to him; the man who identified himself as the plaintiff, and he took it into his hands and received it, and I gave it to him on behalf of Mr. Fixa. If there is any question about this tactic, let Mr. Krause say so.

The Court: That is not an unreasonable requirement. Your order shortening time is predicated on the representation that certain material is in danger of physical destruction.

Mr. Krause: Yes.

The Court: You know what the material is, I assume.

Mr. Krause: Now there has been an abrupt change of circumstances.

The Court: Eliminating the necessity of a temporary injunction and allowing you with a complaint which has been on file and which is still on file.

Mr. Krause: I can see Your Honor's point. But I once again urge that the Court be somewhat more farsighted [fol. 32] in this matter and realize what the intention of the government is in this entire litigation. It is true that we are just hearing a motion for a preliminary injunction or a temporary restraining order; whatever it be termed. However, the intent of the government in delivering this material is obviously to make the suit moot, Your Honor.

The Court: Does it make it moot? That is a question which is going to be determined later on on motion for summary judgment.

Mr. Krause: If it is the entire subject matter of the litigation—

The Court: According to your complaint, it isn't.

Mr. Krause: Mr. Heilberg's cause of action. There is more than one cause of action. On his cause of action it is the subject matter of his cause of action and the consequences flowing from this.

The Court: The statute imposes very rigid controls on

the District Court insofar as restraint imposed on any government officials. The provisions as to notice are quite clear. The notice in this case was shortened, time of notice was shortened, only because of the alleged emergency insofar as these particular items of property may have been concerned. Now that they are no longer in danger or unless you are in a position to establish the fact that there is something other than what has been offered by the [fol. 33] government unconditionally, I just do not feel there is any justification in the law or in logic for me at this time to take action where the notice to the government does not comply with the statutory provisions of Section 2284.

Mr. Krause: I am not going to further argue the point, Your Honor. You seem to have made up your mind.

The Court: Do you acquiesce in the proposition, though, that this material is the material to which your motion was directed?

Mr. Krause: No, sir, I do not.

The Court: All right, then, put in evidence to establish to the contrary.

Mr. Krause: I have no evidence to offer, Your Honor.

The Court: Does the government represent that there is nothing in the possession of the Postmaster named in the complaint?

Mr. Collett: Subject to this suit, yes, Your Honor. This is it.

The Court: If this motion, entitled Motion for Order Granting Preliminary Injunction, was designed to effect an order for temporary restraint imposed upon the Postmaster to prevent destruction of the mail matter, the motion is denied. It is not the intent, however, of the Court, [fol. 34] to order anything which will affect the initial action except to the extent that absence of the material itself may give rise to a national defense.

Mr. Collett: If the Court please, will you direct your attention now just to one further question. The way that motion is worded, it would be my view that the motion is for a preliminary injunction which can only be granted by a three-judge court. A three-judge court is in accordance with Sections 2284 and 2281 of Title 28 and requires the Court to make determination that there is a substantial constitutional question presented to require the convening

of a three-judge court. Also, it requires a substantial showing that there is irreparable damage being involved.

If Your Honor has determined this is an application actually for a temporary restraining order that was not granted—

The Court: Mr. Collett, I have no authority to make any determination as to the ultimate question of substantial constitutional question at this time. The government has not received the required notice for any such hearing.

Is that true?

Mr. Collett: That is true. But the section calls for you to advise the Chief Judge even notwithstanding the ab-[fol. 35] sence of notice might be raised as an infirmity as far as the proceedings are concerned. But you have to make a determination that there is a substantial constitutional question before you request—

The Court: I think I indicated at the start of the hearing that in the posture of the case as it stood in the initial phase of this hearing I thought there was a substantial question. Now, whether or not the absence of subject matter of the suit, the material itself, changes that position, I do not know. I do not think there is any reason to determine it now until the government has had its five days notice and this comes up in the normal course of events.

#### RULING DENYING APPLICATION, ETC.

Mr. Collett: The application which is now before Your Honor, whether it is a preliminary or temporary restraining order, is denied?

The Court: Is denied.



[fol. 36]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

No. 41660

ORDER DENYING THE MOTION FOR ORDER GRANTING PRELIMINARY (TEMPORARY) INJUNCTION (RESTRAINING ORDER)—  
August 2, 1963.

On July 30, 1963 plaintiffs filed an action for injunctive and declaratory relief predicated upon alleged unconstitutionality of Title 39 U.S.C. § 4008 regulating the mailing of "Communist Political Propaganda". Plaintiffs' prayer included a request for a temporary restraining order restraining defendants from destroying or disposing of certain written matter entitled "A Proposal Concerning the General Line of the International Communist Movement" allegedly in the physical possession of the defendant John F. Fixa. On July 31, 1963 plaintiffs filed a motion for order granting preliminary injunction and obtained an order shortening time for notice of hearing on said motion on Friday, August 2, 1963. Although described as a motion for an order granting a preliminary injunction it was considered by this court as a motion for a temporary restraining order pursuant to Title 28 U.S.C. § 2284, par. 3, to prevent irreparable damage.

[fol. 37] At the hearing on August 2, 1963, the defendant John F. Fixa, through counsel, gave an unconditional release of physical possession and all claim to the material described in the motion filed on July 31, 1963. Upon representation of government counsel that the material tendered constituted all mail matter described in the above complaint and in the possession of any of the defendants named, plaintiffs conceded the absence of any evidence to the contrary. Therefore, it appearing to the court that subject matter to which a temporary restraining order could be directed is neither in jeopardy of destruction or other disposition as alleged in plaintiffs' motion and is in fact

immediately available to plaintiffs, the motion for order granting preliminary (temporary) injunction (restraining order) is Denied:

Further action by this court with regard to the complaint filed July 30, 1963 will be in accordance with procedure contemplated by Title 28 U.S.C. § 2284 and upon notice as fixed by that section.

Dated: August 2, 1963

Lloyd H. Burke, United States District Judge.

[fol. 38] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

DEFENDANTS' MOTION TO DISMISS—Filed September 30, 1963

Comes now the defendants, and each of them, and move to dismiss the complaint and action filed herein on the following grounds:

# I

As to the cause of action of the plaintiff Leif Heilberg, (a) on the grounds that the complaint does not state a claim upon which relief can be granted; and (b) that said action is moot.

# II

As to the plaintiff Marshall W. Krause, on the grounds (a) that the complaint does not state a claim upon which relief can be granted, and (b) that the above Court is without jurisdiction of the subject matter.

Dated: September 30, 1963.

Cecil F. Poole, United States Attorney. By /s/  
Charles Elmer Collett, Assistant United States  
Attorney, Attorneys for Defendants.



[fol. 39] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

Civil No. 41660

AFFIDAVIT OF CHARLES ELMER COLLETT—Filed October 2,  
1963

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

Charles Elmer Collett, being first duly sworn, deposes  
and says:

1. That he is an Assistant United States Attorney for  
the Northern District of California, and in such capacity is  
familiar with the above case;

2. That at the hearing on August 2, 1963 of the above  
matter for preliminary injunction, the material described  
in the complaint in the cause of action stated by the plain-  
tiff Leif Heilberg, and in the motion filed on July 31, 1963,  
was delivered unconditionally by affiant to the physical  
possession of the plaintiff Leif Heilberg. The representa-  
tion of the affiant to this Court at said time was uncon-  
troverted, that the material delivered to the possession of  
said plaintiff Leif Heilberg constituted all the mail matter  
described in the complaint and in the possession of any of  
[fol. 40] the defendants named.

3. The above entitled Court in its Order of August 2,  
1963 found such statement to be the fact, and that plaintiffs  
conceded the absence of any evidence to the contrary.

4. Affiant is informed and believes that the plaintiff  
Heilberg has been advised by General Counsel of the Post  
Office that all Communist political propaganda addressed  
to him will in the future be forwarded without further  
inquiry by the Post Office Department.

5. Affiant is informed and believes that appropriate  
officials have been instructed that all Communist political

propaganda addressed to plaintiff Heilberg will be delivered to him without further inquiry.

Dated: September 30, 1963.

Charles Elmer Collett, Assistant United States Attorney.

Subscribed and sworn to before me this 1st day of October, 1963: Victor J. Fox Deputy Clerk District Court the U.S. Nor. Dist. of California.

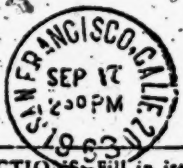
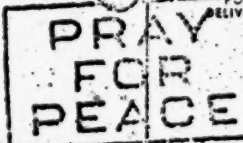
[fol. 41]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

Civil No. 41660

POST OFFICE DEPARTMENT OFFICIAL BUSINESS		PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, \$300	
			
INSTRUCTIONS: Fill in items below and complete #1 on other side, when applicable. Moisten gummed ends and attach to back of article. Print on front of article RETURN RECEIPT REQUESTED.			
REGISTERED NO.	NAME OF SENDER		
171803	Post Office Dept		
CERTIFIED NO.	STREET AND NO. OR P.O. BOX		
	1111 ST. P. CA AVE NW		
INSURED NO.	CITY, ZONE AND STATE		
	Washington, DC 20060		
RETURN TO			

Gen Counsels CFF 2m 4228

[fol. 42] AFFIDAVIT OF LOUIS J. DOYLE, GENERAL COUNSEL  
Post Office Department—Filed October 7, 1963

I, Louis J. Doyle, do hereby swear to the following facts:

- 1.) That the administration of § 305 of Public Law 87-793 is vested in my office.
- 2.) That on September 16, 1963, I wrote Mr. Leif Heilberg, 1801 Page Street, San Francisco, California 94117, and Mr. Marshall W. Krause, Staff Counsel, American Civil Liberties Union of Northern California 503 Market Street, San Francisco, California 94105, to inform them that the Post Office Department would no longer detain Communist political propaganda addressed to them. The letters were sent to Mr. Heilberg and Mr. Krause by Registered Mail (Registered Numbers 171802 and 171803, respec-

tively), and a return receipt was received from Mr. Krause, signed by his agent, Lee Anderson, indicating delivery of his letter to him on September 17, 1963. True carbon copies of these letters are attached to this affidavit, along with the returned receipt.

3.) That on September 16, 1963, I sent written instructions to the Postmasters at each of the Communist propaganda screening units, advising them to release all present material held for Mr. Leif Heilberg and Mr. Marshall Krause, and further advising them not to detain any future material addressed to Mr. Heilberg or Mr. Krause. These instructions were sent by regular mail, and there is no reason to believe that the instructions have not been delivered.

Louis J. Doyle, General Counsel.

UNITED STATES OF AMERICA,  
District of Columbia, ss:

Sworn to before me this 2nd day of October, 1963.

Lawrence B. Gowen, My Commission expires April 30, 1966.

[fol. '43]

**ATTACHMENT TO AFFIDAVIT**  
**September 16, 1963**

**#1-INSTRUCTIONS TO DELIVERING EMPLOYEE**
☐ Deliver *ONLY* to addressee

☐ Show address where delivered

(Additional charges required for these services)

**RETURN RECEIPT**

Received the numbered article described on other side.

SIGNATURE OR NAME OF ADDRESSEE (must always be filled in)

MARSHALL W. KRAUSE

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

Lee Anderson

DATE DELIVERED

ADDRESS WHERE DELIVERED (only if requested in item #1)

7-17-63

CAS-16-71848-8 GPO

Mr. Marshall W. Krause  
 Staff Counsel  
 American Civil Liberties Union  
 of Northern California  
 503 Market Street  
 San Francisco, California 94105

Dear Mr. Krause:

On July 30, Civil Action No. 41660 was filed in the Federal District Court of the Southern Division, Northern District of California, entitled *Heilberg and Krause v. Day et al.*

It is the opinion of this office that this complaint constitutes an expression of desire by you to receive all of your mail whether or not the Customs Bureau of the Treasury Department considers it to be Communist political propaganda. Since 39 U.S.C. § 4003 states that "... detention shall not be required in the case of matter which is ... otherwise ascertained by the Postmaster General to be desired by the addressee.", I have issued instructions to the postmasters at all foreign propaganda screening points that any mail presently being detained be dispatched and that in the future mail addressed to you not be detained.

Sincerely, (Signed) Louis J. Doyle, General Counsel.

[fol. 44]

## ATTACHMENT TO AFFIDAVIT

September 16, 1963

Mr. Leif Heilberg  
1801 Page Street  
San Francisco, California 94117

Dear Mr. Heilberg:

On July 30, Civil Action No. 41660 was filed in the Federal District Court of the Southern Division, Northern District of California, entitled *Heilberg and Krause v. Day et al.*

This suit challenges the authority of the Postmaster General to detain mail addressed to you and challenges the Constitutionality of the legislation which authorized this detention.

It is the opinion of this office that this complaint constitutes an expression of the desire by you to receive all of your mail whether or not the Customs Bureau of the Treasury Department considers it to be Communist political propaganda. Since 39 U.S.C. § 4008 states that "... detention shall not be required in the case of matter which is ... otherwise ascertained by the Postmaster General to be desired by the addressee.", I have issued instructions to the postmasters at all foreign propaganda screening points that any mail presently being detained be dispatched and that in the future mail addressed to you not be detained.

Sincerely, (Signed) Louis J. Doyle, General Counsel.



[fol. 45] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

Civil No. 41660

[fol. 46] AFFIDAVIT OF LOUIS J. DOYLE, GENERAL COUNSEL  
POST OFFICE DEPARTMENT—Filed October 14, 1963

I, Louis J. Doyle, do hereby swear to the following facts:

1.) That the administration of Public Law 87-793 is vested in my office.

2.) That on September 16, 1963, I wrote Mr. Leif Heilberg, 1801 Page Street, San Francisco, California 94117, to inform him that the Post Office Department would no longer detain Communist political propaganda addressed to him. The letter was sent to Mr. Heilberg by Registered Mail (Registered No. 171802), and a return receipt was requested. The attached Post Office Department Form 1510 from the Postmaster at San Francisco, California, states that delivery of the letter was made to that address on September 17, 1963, and was accepted by E. Heilberg.

Louis J. Doyle, General Counsel.

UNITED STATES OF AMERICA,  
District of Columbia, ss:

Sworn to before me this 9th day of October, 1963.

Lawrence B. Gowen, My Commission expires April 30, 1966.

[fol. 47]

## ATTACHMENT TO AFFIDAVIT

POD Form 1510—Original—Part II Date 9-26-63

## INQUIRY FOR THE LOSS OR RIFLING OF MAIL MATTER

Registered No. 171802 ( ) Special Delivery  
 (A) Letter Certified No. ( ) Special Handling  
 (P) Parcel Insured No. (X) Air Mail  
 (Insert "Unnumbered" if 10¢ fee)

( ) Ordinary C. O. D. No. Charges, \$

Envelope: (A) Long. ( ) Short. ( ) Business reply (Postage to be paid by addressee.)

Complaint Loss Date mailed 9 16 63 4PM Mon  
 (Loss or rifling) (Mo.) (Date) (Yr.) (Hr.) (Day of week)

Mailed at Washington, D. C.  
 (City and State)

Where deposited Benjamin Franklin Post Office  
 (Main office, station, branch, or location of collection box)

Contents (describe fully) and value Letter

Sender: Office of the General Counsel Addressee: Mr. Laif Hailberg  
 (Name) (Name)

Post Office Dept. Rm. 228 1801 Page Street  
 (St. or P. O. Box or Rural Route No.) (St. or P. O. Box or Rural Route No.)  
Washington, D. C. 20260 San Francisco, Calif. 94111  
 (City) (Zone) (State) (City) (Zone) (State)



POD Form 1510—Original—Part III Date SEP 27 1963  
 POSTMASTER, OFFICE OF ADDRESS:

Please show disposition of the above-described article. C. G. Beall  
Postmaster  
 (Postmaster at mailing office)

REPLY SEP 30 1963  
 Date SEP 30 1963, 19 Has addressee received article? Yes  
 (Yes or No)

(If delivered, show date; if no record, so state Sept. 17, 1963)

If delivered to firm, state accepting employee's name C. Hailberg

If not intact, what was missing?

If C. O. D., give money order No. , date , 19

If undelivered and on hand, state reason

If received but not delivered and not on hand, state disposition

John F. Hina Claims Section SEP 30 1963

Postmaster (Postmaster at address office)

[fol. 48] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

Civil No. 41660

ORDER DISMISSING AS TO MARSHALL W. KRAUSE AND DENYING  
MOTION WITHOUT PREJUDICE AS TO HEILBERG—October  
29, 1963.

The motion to dismiss the above complaint and action having come on regularly for hearing this 24th day of October, 1963, Plaintiff Heilberg appearing by his counsel, Marshall W. Krause, and Associate Counsel Coleman Blease, and Plaintiff Krause appearing in propria persona and by Associate Counsel Coleman Blease, the Defendants appearing by Cecil F. Poole, United States Attorney and Charles Elmer Collett, Assistant United States Attorney, before the Honorable Alfonso J. Zirpoli, Judge of the above-entitled Court; and the matter having been argued and submitted, and the Court being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. As to the Plaintiff Marshall W. Krause, the motion to dismiss is granted, and the complaint and action are hereby dismissed.

[fol. 49] 2. As to the Plaintiff Leif Heilberg, the motion to dismiss is denied without prejudice to a presentation of the same motion to a three-judge court, the convening of which will be forthwith requested by this Court.

Dated: October 29, 1963

Alfonso J. Zirpoli, United States District Judge.

[fol. 50] IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

DEFENDANTS' MOTION TO DISMISS—Dated December 9, 1963

Comes now the defendants, and each of them, by their attorneys, Cecil F. Poole, United States Attorney and Charles Elmer Collett, Assistant United States Attorney, and move to dismiss the complaint and action filed herein by the plaintiff Leif Heilberg on the following grounds:

I

That the said action is moot.

II

That the complaint does not state a claim upon which relief can be granted.

III

That the Court is without jurisdiction of the subject matter.

IV

That the complaint does not state a substantial question of constitutionality.

V

[fol. 51]

Said Motion will be based on the records and files in this office, together with the affidavits of Charles Elmer Collett, Assistant United States Attorney, and Louis J. Doyle, General Counsel of the Post Office Department, heretofore filed, copies of which are attached hereto.

Dated: December 9, 1963.

Cecil F. Poole, United States Attorney. /s/ Charles  
Elmer Collett, Assistant United States Attorney,  
Attorneys for Defendants

CERTIFICATE OF SERVICE (omitted in printing).

[fols. 52-59] CLERK'S NOTE

Attachments to "Defendants motion to dismiss"—Affidavits of Charles Elmer Collett and Louis J. Doyle are omitted from the record here. They appear at folios 39-42 and 45-47 supra.

[fol. 60] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

[Title omitted]:

PLAINTIFF'S POINTS AND AUTHORITIES IN OPPOSITION TO  
MOTION TO DISMISS—Filed December 24, 1963 (omitted  
in printing.)

[fol. 61] APPENDIX I TO PLAINTIFF'S POINTS AND AUTHORI-  
TIES IN OPPOSITION TO MOTION TO DISMISS

Marshall W. Krause  
Staff Counsel  
American Civil Liberties Union  
503 Market Street  
San Francisco 5, California  
EXbrook 2-4692,  
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

LEIF HEILBERG and MARSHALL W. KRAUSE, Plaintiffs,

v.

JOHN F. FIXA, ET AL, Defendants.

STATE OF CALIFORNIA,  
County of Los Angeles, ss:

Charles Amlin, being duly sworn, deposes and says:

1. I am the plaintiff in an action now pending in the  
United States District Court for the Southern District of  
California, Central Division challenging the validity of 39  
U.S.C. § 4008. The name and number of said action is as

follows: *Charles Amlin v. Leslie N. Shaw*, Acting Postmaster, Los Angeles, California; John F. Fixa, Postmaster, San Francisco, California; J. Edward Day, Postmaster General of the United States; No. 63-635-PH. Said action was filed on May 31, 1963.

2. On or about June 25, 1963, I received the letter attached to this affidavit as Exhibit A and incorporated herein as if set out here in full.

Charles Amlin.

Subscribed and sworn before me this 19th day of December, 1963.

Sheila M. Schaum, Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 1, 1964.

[fol. 62]

EXHIBIT A TO APPENDIX I

Post Office Department  
Office of the General Counsel  
Washington 25, D. C.  
June 24, 1963

Mr. Charles Amlin  
1107 Topeka Street  
Pasadena, California

Dear Mr. Amlin:

On March 1, 1963, you were notified by the Acting Postmaster at Los Angeles, California, that his office was holding unsealed mail matter; to wit, one copy of *The People's Korea*, addressed to you from a foreign country, which mail matter had been determined by the Secretary of the Treasury to be Communist political propaganda, pursuant to the provisions of P. L. 87-793. You were requested to advise the Los Angeles postmaster if you desired delivery of this and similar publications. You were requested to make known your desires in this matter prior to March 22, 1963. For your convenience, a franked card was furnished you for this purpose.



Likewise, on May 16, 1963, you received a similar notice from the Postmaster at San Francisco concerning a copy of *The People's Korea* addressed to you. You were requested to make known your desires with respect thereto prior to June 4, 1963. Again, for your convenience, a franked card was furnished you for this purpose.

On May 31, 1963, you filed Civil Action No. 63-635-PH in the United States District Court for the Southern District of California against the Acting Postmaster at Los Angeles, Leslie N. Shaw; the Postmaster at San Francisco, John F. Fixa; and the Postmaster General of the United States, J. Edward Day.

In this civil action you state that you desire to receive *The People's Korea* every week; and you further state that you desire to receive all other mail which may be addressed to you in the future which is determined to be Communist political propaganda.

[fol. 63] In accordance with your instructions, all copies of *The People's Korea* addressed to you now in the possession of the Post Office Department are being forwarded to you under separate cover. Also, instructions have been issued to insure that in the future all Communist political propaganda will be sent to you without delay.

Sincerely, Louis J. Doyle, General Counsel.

cc: Francis G. Whelan, Esq., United States Attorney, Los Angeles 12, California. A. L. Wirin, Esq., Fred Okrand, Esq., 257 So. Spring Street, Los Angeles 12, California.

[fol. 64] APPENDIX II TO PLAINTIFFS' POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

LEIF HEILBERG and MARSHALL W. KRAUSE, Plaintiffs,

v.

JOHN F. FIXA, individually and as Postmaster, San Francisco, California; J. EDWARD DAY, individually and as Postmaster General of the United States; GEORGE BROKAW, individually and as Collector of Customs, San Francisco, California; DOUGLAS DILLON, individually and as Secretary of the Treasury of the United States, Defendants.

STATE OF NEW YORK,

County of New York, ss.:

Corliss Lamont, being duly sworn, deposes and says:

1. I am the owner and manager of Basic Pamphlets, an unincorporated association engaged in the publication and distribution of pamphlets and other literature on subjects of public interest.

2. On August 13, 1963 Basic Pamphlets instituted an action against the Postmaster General of the United States in the United States District Court for the Southern District of New York to challenge the constitutionality of 39 U.S.C. 4008. The case is entitled *Basic Pamphlets v. The Postmaster General of the United States* (S.D.N.Y. 63 Civ. 2422).

3. On August 30, 1963 the Acting General Counsel of the Post Office Department wrote me the letter annexed hereto as Exhibit A.

Sworn to before me this 22 day of November, 1963

Corliss Lamont.

Jeanette Rosenfeld Notary Public, State of New York, No. 24-3355935, Qualified in Kings County, Cert. filed in New York County.

Commission Expires March 30, 1965.

[fol. 65]

## EXHIBIT A TO APPENDIX II

POST OFFICE DEPARTMENT  
Office of the General Counsel  
Washington, D.C. 20260  
August 30, 1963

Dr. Corliss Lamont  
c/o Rabinowitz & Bondin  
Attorneys at Law  
30 E. 42nd Street  
New York, New York 10017

Dear Dr. Lamont:

On August 13, 1963, civil action was filed in the Federal District Court of the Southern District of New York against the Postmaster General of the United States on behalf of an organization known as Basic Pamphlets, which, according to the complaint, is owned and managed by you.

This suit challenges the authority of the Postmaster General to detain mail addressed to Basic Pamphlets and challenges the Constitutionality of the legislation which authorized this detention.

It is the opinion of this office that this complaint constitutes an expression of desire by Basic Pamphlets and you as owner and manager to receive all of your mail whether or not the Customs Bureau of the Treasury Department considers it to be Communist political propaganda. Since 39 U.S.C. §4008 states that "... detention shall not be required in the case of matter which is ... otherwise ascertained by the Postmaster General to be desired by the addressee.", I have issued instructions to the postmaster at New York City and to the postmasters at all other foreign propaganda screening points that any mail presently being detained be dispatched and that in the future mail addressed to Basic Pamphlets or to yourself not be detained.

Sincerely, Adam G. Wendul, Acting General Counsel.

[fol. 66] APPENDIX III TO PLAINTIFFS' POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS

Statement of Tyler Abell, Associate General Counsel of the Post Office Department before the Postal Operations Subcommittee of the House Post Office and Civil Service Committee, June 19, 1963.

Good morning Mr. Chairman, and members of the Committee. It is indeed a pleasure for me to appear this morning before this Committee, to report on the Post Office Department's implementation of section 305 of Public Law 87-793.

I have a brief statement, and since I assume that you are interested in the quantity of this material, I also have some statistics. With your permission I will read the statement, which, as I said is brief, and summarize the statistics which are not so brief. However, you may want to include all the statistical data as part of the record.

As this Committee knows, the legislation in question directs the Post Office Department and the Treasury Department to set up a screening procedure to intercept Communist political propaganda and withhold from delivery any that is not desired by the intended recipients.

Generally speaking, Post Office and the Customs Bureau have divided up the work as follows:

1. Customs decides what countries' mail should be screened.
2. Customs decides where screening points should be established.  
They are currently at: Chicago, El Paso, Honolulu, Los Angeles, Miami, New Orleans, New York, San Francisco, San Juan, Puerto Rico, and Seattle.
3. Post Office arranges to route all mail from the [fol. 67] designated countries through one of the screening points.
4. At the screening point, postal personnel sort out all exempt mail for immediate dispatch and hold the rest for Customs examination.
5. Customs examines the detained mail to determine what is and what is not propaganda.
6. Non-propaganda is then dispatched, and the prop-

aganda is held for determination by Post Office as to whether or not it is desired by the addressee.

7. Where the desire of the addressee is already known, the mail is handled accordingly. Otherwise a notice (POD Form 2153-X) is sent to the addressee, and the mail is filed awaiting a reply. If a reply is received, the mail is handled according to the request of the addressee. The notice informs the addressee that we must hear from him in 20 days or the material will be destroyed, and it will be assumed that he does not want to receive any of this type of material. Thus, each day we clean our storage bins and destroy all material which has been held 20 days.

Statistics are compiled by the postal people at each of our units, and submitted to headquarters each month. Since this program was just started January 7, the figures for January and February are not too complete; however I can summarize the reports for March, April and May as follows.

[fol. 68] Total of all mail sent to Foreign

Propaganda Units	8,575,367	pieces
Exempt	4,540,488	pieces
Detained for Customs examination	3,954,092	pieces
Determined by Customs to be propaganda	286,583	pieces
Not propaganda	3,689,401	pieces
Propaganda known to be wanted	261,310	pieces
Propaganda known to be unwanted	8,863	pieces
Notices sent out	8,072	
Notices unreturned	2,882	
Notices returned as undeliverable	917	
Replied:		
Deliver all	1,658	
Deliver none	1,835	
Deliver some	972	

[Vol. 69]

## Month of March 1963

	Total of all mail sent to Foreign Prop- aganda Units	Addressed to Gov. Agencies or otherwise exempt	Detained for examination by Customs	Detained mail determined propaganda	Detained mail determined not propaganda	Known to be wanted	Known to be not wanted
New York.....	1,173,689	340,454	833,235	82,417	750,818	79,783	467
Chicago.....	448,265	409,007	39,258	935	38,323	273	103
San Francisco.....	47,489	42,738	4,751	4,058	693	1,058	5
Los Angeles.....	62,573	3,660	58,913	1,293	57,620	419	767
Honolulu.....	none	0	0	0	0	0	0
El Paso.....	708,507	707,967	540	27	513	10	3
New Orleans.....	64,903	18,788	46,115	47	46,068	0	0
Miami.....	40,646	39,041	1,605	277	1,328	105	86
Seattle.....	71,643	9,605	62,038	423	61,614	104	93
San Juan**							
Total	2,617,713	1,571,260	1,046,435	89,477	996,977	81,732	1,531
Laredo*	80,784						

\* Laredo preliminarily screens incoming mail from Mexico. Exempt mail is forwarded directly; mail requiring determination by Customs as to whether or not it is propaganda is sent to El Paso and New Orleans.

\*\* No report received from San Juan

Tyler Abell, April 16, 1963.



[fol. 70]

## Month of March, 1963

No. of Pieces on which notices sent out	Total No. of notices sent out	Replies		Notices undeliverable	Notices not returned
		deliver all	deliver none		
2,167	2,088	408	332	56	814
554	600	52	83	14	445
2,995	218	117	13	2	46
107	437	70	167	39	198
0	0	0	0	0	0
14	27	5	3	0	19
47	47	0	7	24	40
84	83	26	28	9	15
227	182	33	46	10	74
6,195	3,632	711	679	220	1,654

## Month of April, 1963

[fol. 71]

Port	Total of all mail sent to- Foreign Prop- aganda Units	Addressed to Gov. Agencies or otherwise exempt	Detained for examination by Customs	Detained mail determined propaganda	Detained mail determined not propaganda	Known to be wanted	Known to be not wanted
N. Y.	1,393,672	318,514	1,075,155	99,991	975,164	96,539	2,722
Chicago	576,378	478,366	98,012	1,962	96,050	1,231	404
S. F.	142,563	141,283	1,280	1,187	93	159	60
L. A.	66,273	4,979	61,294	1,671	59,623	175	458
Honolulu	813	775	38	38	0	0	0
El Paso	387,961	383,664	4,297	164	4,133	8	8
N. O.	14,809	6,542	8,267	120	8,147	2	85
Miami	10,359	9,376	983	239	744	95	60
Seattle	66,687	9,651	57,036	1,024	56,021	275	572
San Juan	.....	not operating	.....	.....	.....	.....	.....
Total	2,659,515	1,353,150	1,306,362	106,396	1,199,975	97,484	4,369

Note: Laredo screened 303,362 pieces of mail. All were exempt; all were from Mexico.

[fol. 72]

Month of April, 1963

No. of Pieces on which notices sent out	Total No. of notices sent out	Replies			Notices undeliverable	Notices not returned
		deliver all	deliver none	deliver some		
730	730	205	204	199	64	125
1,327	683	104	230	78	20	271
968	391	154	24	50	88	75
1,038	85	21	31	0	20	33
38	38	0	3	0	6	29
148	42	3	2	0	0	37
33	33	0	3	0	0	30
84	64	8	11	10	1	35
177	90	27	31	16	10	16
		not operating				
4,543	2,156	522	539	353	209	651

Port	Total of all mail sent to Foreign Prop- aganda Units	Addressed to Gov. Agencies or otherwise exempt	Detained for examination by Customs	Detained mail determined propaganda	Detained mail determined not propaganda	Known to be wanted	Known to be not wanted
N. Y.	1,403,743	164,134	1,239,609	85,557	1,154,052	81,044	1,244
Chicago	450,845	375,250	75,595	1,140	75,455	255	507
S. F.	166,978	20,884	146,094	1,215	165,763	94	255
L. A.	61,192	6,493	54,699	1,719	52,980	280	475
Honolulu	390	388	2	2	0	2	0
El Paso	398,711	393,682	5,029	239	4,790	164	6
New Orleans	7,561	2,884	4,677	45	4,642	0	5
Miami	1,344	834	510	44	466	6	0
Seattle	88,767	13,707	75,060	759	74,301	229	471
San Juan			Scheduled to start operating June 17				
Total	2,579,431	978,256	1,601,275	90,710	1,532,449	82,074	2,968

Note: Laredo screened 334,460 pieces of mail. All was exempt; all was from Mexico.

[fol. 74]

Month of May, 1963

No. of Pieces on which notices sent out	Total No. of notices sent out	Replies		Notices undeliverable	Notices not returned
		deliver all	deliver none		
3,269	926	37	351	44	506
408	163	79	41	9	13
866	866	202	195	383	
964	126	18	11	7	9
0	0	0	0	0	0
69	48	3	4	6	28
30	30	0	0	28	0
44	35	13	7	6	4
59	40	13	8	5	17
<u>5,709</u>	<u>2,234</u>	<u>365</u>	<u>617</u>	<u>488</u>	<u>577</u>
				<u>171</u>	

fol. 75] IN THE UNITED STATES DISTRICT COURT, NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

before: Hon. Homer T. Bone, Judge, Hon. Albert C. Wollenberg, Judge, Hon. Alfonso J. Zirpoli, Judge.

No. 41,660

LEIF HEILBERG, Plaintiff,

vs.

JOHN F. FIXA, et al., Defendants.

Transcript of Hearing on Motion to Dismiss—January 2,  
1964

APPEARANCES:

For the Plaintiff: Marshall W. Krause, Esq., and Coleman Blease, Esq.

For the Defendants: Cecil F. Poole, Esq., United States Attorney. By: Charles Elmer Collett, Esq., Assistant U. S. Attorney.

fol. 76] The Clerk: Leif Heilberg versus John F. Fixa, Postmaster, for Hearing on Motion to Dismiss, convened before a duly-constituted three-judge court consisting of The Honorable Homer T. Bone, United States Circuit Judge; the Honorable Albert C. Wollenberg and Alfonso J. Zirpoli, United States District Judges for the Northern District of California as provided by and pursuant to the provisions of 28 United States Code, Section 2884.

Will counsel state their appearances for the record?

Mr. Collett: Charles Elmer Collett of the United States Attorney's Office, for the moving party.

Mr. Krause: Marshall W. Krause for the opposition.

Mr. Blease: Coleman Blease for the plaintiff.

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Bone: Mr. Collett, unhappily for you, you seem to have the burden here of proceeding because your motion is the one that we have to confront first.

Mr. Collett: Yes, that is correct, Your Honor.



Judge Bone: Will you tell us why we should dismiss this case?

Mr. Collett: Yes, Your Honor.

First, Your Honor having called my attention to the fact that there is a motion before the Court and that is the only matter before the Court at this time, Mr. Krause has caused to be served upon the Postmaster, Mr. Fixa, personally a subpoena to bring with him a complete file and list of [fol. 77] persons and organizations and so on, without reading the whole thing, which I consider at this time to be not relevant and not proper, and I would like to be able to instruct the Postmaster that as far as the subpoena is concerned, it may be quashed, or else whatever disposition made of it that the Court thinks to be proper.

Judge Bone: May I inquire if you intend to introduce some testimony?

Mr. Collett: No.

Judge Bone: You have no witnesses?

Mr. Collett: No, this is a motion to dismiss.

Judge Bone: Do your opponents have any witnesses they intend to introduce? We have a bare record here on the question of wilfulness, which is important.

Mr. Collett: The question of wilfulness—

Judge Bone: The man claims he is threatened with something. The injunction is a pretty strenuous remedy.

Mr. Collett: With regard to the mootness, the order of Judge Burke, when it appeared on the hearing before Judge Burke for the temporary restraining order, where the proceedings occurred that the mail matter which is involved here, which I will discuss with the Court on the motion, was delivered.

Judge Bone: Did Judge Burke hear any witnesses?

Mr. Collett: No, other than what transpired before him [fol. 78] in court.

Judge Bone: All on the record?

Mr. Collett: That's right.

Judge Zirpoli: May I be permitted to interject a question at this time?

Judge Bone: Yes.

Judge Zirpoli: Mr. Collett, apropos with your question with relation to witnesses, subpoenaed, and without indicating in any way what may be the ultimate ruling of the

Court, certainly not presuming for the moment to speak for either of the other two distinguished members of this panel, I should like to ask, assuming for the moment that this Court were to find that the case is not moot and were to conclude that there is a proper controversy before it, would it be the intention of the Government to thereafter introduce evidence or take any further steps in order that the Court might properly pass upon the ultimate question, if it should reach that stage?

Mr. Collett: If the Court please, I think if the motion to dismiss at this stage of the case is denied by the Court, it will be necessary then to afford time to answer.

Judge Wollenberg: Correct.

Mr. Collett: And to file an answer.

Judge Wollenberg: There is no pleading here at all. That is what I was going to say.

Mr. Collett: This is a motion to dismiss, like any [fol. 79] number of other motions, and I think that the other record is before the Court.

Judge Wollenberg: Surely.

Judge Bone: That would rest, wouldn't it, Mr. Collett, inevitably on the fact that there is no justiciable controversy here that the Court can take cognizance of?

Mr. Collett: Yes, Your Honor, that is correct. What has transpired, and the facts and the allegations of the complaint, is there any matter actually before this Court to be disposed of? That is the basis of the motion, Your Honors.

Judge Bone: This man, I assume, is getting his mail right along.

Mr. Collett: That is right, Your Honor.

Judge Bone: I am wondering how an injunction would serve any other purpose than in a sense being a declaratory judgment.

Mr. Collett: As it stands now——

Judge Bone: That must rest on something pretty substantial.

Mr. Collett: As it stands now, I would suggest to the Court that there is no problem of an injunction involved here at the present time. There is nothing to be enjoined actually. What is barely before the Court, if anything, is an action which in the first sentence of the first paragraph is a prayer for injunction. I intend to take the allegations

[fol. 80] of the complaint and endeavor to consider just what the plaintiff seek before this Court.

Judge Bone: These are preliminary questions and not to indicate any attitude of mind here because it is difficult for a court like this to have an attitude of mind at this particular stage of the hearing. If there is anything well grounded and solid bench-marked in law, it is that you can't enjoin a fellow from doing something that he isn't threatening to do. Otherwise, you could get out an injunction against every known criminal in the country and say, "You shall not commit any crime."

In your argument I hope you will make plain just exactly the posture of this case and why an injunction is the proper remedy. Without the proper basis for this, the case might be considered moot. It might be.

Mr. Collett: That is correct. I mentioned that because the plaintiff has served the Postmaster of San Francisco personally with this subpoena, and, necessarily, it was referred to me and I wanted to call the attention of the Court to it at this time. Having done so, we will leave it stand, and if there is anything further, Mr. Fixa would be available if it was necessary for him to be called. The subpoena was served and necessarily calls for him to appear before this Court at ten o'clock this morning.

Judge Bone: Do you care to make any further argument [fol. 81] on this problem at this time?

Mr. Collett: Oh, yes, I want to make some argument, if the Court please.

As a matter of some convenience to the Court, it may be of interest and also provide some little reading matter here at some considerable length—This is the report of the hearing of the committee of the Post Office and Civil Service of the United States Senate on HR 7927, which has been identified by the plaintiff as HR 7929. I have a copy for each of you here. It contains all the matters that have been referred to by counsel.

Judge Bone: Are these statutes or regulations?

Mr. Collett: No, simply as a matter of the convenience of the Court, this is the hearing before the committee on the statute which is involved here. In other words, you have to look this up in the legislative history, and this is a copy of it all prepared in complete form.

Judge Bone: Can you call our attention to any particular place in this? This is a big record.

Mr. Collett: That is true, Your Honor. That is true. It is just as a matter of convenience. Mr. Krause refers to some portions of that in the memorandum which he filed on December 24th, and I am just giving it to you as a matter of convenience that that is the record, and it also serves his convenience, too. The entire committee hearing is there.

[fol. 82] Mr. Krause: May I approach the bench, Your Honors? I just wanted to say that I haven't seen the report of the hearing in that particular form, and I assume Mr. Collett is giving you the full hearing. He hasn't given me a copy of that particular document, and I would, of course, want to reserve the right to question whether he is giving you the full hearing. I just don't know what document he has given you. I have nothing I can say at this time other than that—unless Mr. Collett would feel able to give me a copy of it, which would be very convenient, I believe.

Mr. Collett: I don't have another copy to give to him. There is another copy that is not in my possession immediately which I will be glad to afford counsel an opportunity to look at, and I think any references he has to make with regard to what is in there, he will find that they are in there. If there is any objection noted to it, why,—

Judge Zirpoli: He will be privileged to examine mine, if he desires.

Judge Wollenberg: Yes, I was going to offer you mine, Mr. Krause. Just pick it up any time. It is in my chambers.

Mr. Krause: Thank you.

#### ARGUMENT ON BEHALF OF DEFENDANTS BY MR. COLLETT

Mr. Collett: The statute which is involved, if the Court please, is Section 4008 of Title 39. Assuming Your Honors have already read it, I would like to refer to it specifically and particularly to certain portions of it which I [fol. 83] think are pertinent. The statute says that:

“Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a for-

eign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda,' shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed 60 days, the matter detained shall be disposed of as the Postmaster General directs."

That is the statute which is the subject of the particular controversy which is now before this Court on the motion to dismiss.

On the complaint which was filed, which is in the record, it is entitled an "Action for Injunctive and [fol. 84] Declaratory Relief — Three-Judge Court Requested."

The first paragraph says:

"That this is a suit for declaratory relief and to enjoin the enforcement of 39 U.S.C. 4008 (Public Law 87-793) regulating the mailing of 'communist political propaganda.' Said statute is set out as 'Exhibit A' attached hereto. This Court has jurisdiction over the subject matter thereof and the defendants herein." and so on, referring to Section 2 of the Constitution and the First and Fifth Amendments.

Paragraph II says:

"There now exists an actual justiciable controversy between plaintiff, who is a resident of this judicial district, and defendants concerning the receipt and mailing of 'communist political propaganda.' Plaintiff, as further described below, will suffer immediate

and irreparable injury if the relief prayed for is not granted."

Paragraph III says:

"The defendants, and each of them, in their captioned official capacities are charged with the enforcement of the provisions of 39 U.S.C. Section 4008 by the terms of the statute itself, or, as to Defendants Fixa and Brokaw, by the orders, regulations and instructions of their superiors, and have enforced and [fol. 85] threatened to continue to enforce said law in the manner hereinafter described, even though, for the reasons hereinafter described, said law is void and unconstitutional."

Paragraph IV says:

"On or about July 12, 1963 plaintiff Leif Heilberg received a letter through the United States mail from the defendant Fixa on a card marked POD Form 2153-X containing the following message:

'Message to Addressee

'This office is holding unsealed mail matter addressed to you from a foreign country. Under Public Law 87-793, the Secretary of the Treasury has determined this mail to be communist political propaganda. It cannot be delivered to you unless you have subscribed to it or otherwise want it.

Please check the appropriate spaces under "Instructions" on this card and return the card.'"

And the instructions were to deliver it or not to deliver this publication and similar publications. In other words there was a place for him to check whether he wanted it.

In Paragraph V the complaint alleges that:

• "Plaintiff Heilberg did not order said detained matter; however, he desires to receive this piece of mail and all mail addressed to him in the regular [fol. 86] course of the post without said mail being delayed, labeled, read, screened, passed, detained, de-



stroyed or otherwise processed pursuant to the terms of 39 USC Section 4008."

Now again, Section 4008 expressly provides that the man "shall be notified that such mail has been received and will be surrendered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee."

On the basis of the allegations in the complaint that the plaintiff desired to receive this particular matter, when the matter came on for hearing before Judge Burke, I had in my possession the particular piece of mail which is involved. I ascertained the identity of the plaintiff, who readily, through his counsel and himself, stood up, and I personally handed the particular piece of mail which is involved to him. He received it into his possession, but I note that counsel now in his memorandum which was filed has made certain statements which indicate that something other than that happened.

The order of Judge Burke in denying the temporary restraining order recites:

"On July 30, 1963 Plaintiffs filed an action for [fol. 87] injunctive and declaratory relief predicated upon alleged unconstitutionality of Title 39 U.S.C., Section 4008, regulating the mailing of 'communist political propaganda.' Plaintiffs' prayer included a request for a temporary restraining order restraining defendants from destroying or disposing of certain written matter entitled 'A Proposal Concerning the General Line of the International Communist Movement' allegedly in the physical possession of the defendant John F. Fixa. On July 31, 1963 plaintiffs filed a motion for order granting preliminary injunction and obtained an order shortening time for notice of hearing on said motion on Friday, August 2, 1963. Although described as a motion for an order granting a preliminary injunction, it was considered by this Court as a motion for a temporary restraining order pursuant to Title 28, Section 2284, U.S.C., Paragraph 3, to prevent irreparable damage.

"At the hearing on August 2, 1963 the defendant John F. Fixa, through counsel, gave an unconditional release of physical possession and all claim to the material described in the motion filed on July 31, 1963. Upon representation of government counsel that the material tendered constituted all mail matter described in the above complaint and in the possession of any of the defendants named, plaintiffs conceded the absence of any evidence to the contrary. Therefore, it appearing to the Court that subject matter to which a [fol. 88] temporary restraining order could be directed is neither in jeopardy of destruction or other disposition as alleged in plaintiffs' motion and is in fact immediately available to plaintiffs, the motion for order granting preliminary (temporary) injunction is denied."

The plaintiff in its memorandum has added a paragraph here with regard to constructive possession, and I seem constrained to make some comment about it.

What he did with the letter after receiving it, I haven't any idea, but he makes the statement on page 1 of his memorandum:

"As the affidavit of Assistant United States Attorney Charles Collett will show, a purported transfer of said mail took place in 'open court' on August 2, 1963, in the courtroom of Judge Burke. Plaintiff in fact refused to accept the mail under such conditions and it was abandoned by the United States Attorney in the courtroom."

Then he goes on to say: "No legal delivery took place under such circumstances and the defendants can be held to a constructive possession of said mail," Now, that statement, I think, belies the order of Judge Burke. I think that the matter was entirely before the Judge and no attempt was made to present anything other than as is indicated in the opinion by the judge, which was conceded [fol. 89] by the plaintiff at the time, was on the basis that whatever the subject matter that was before us, it was delivered to the plaintiff in open court in accordance with

the desire which he expressed in his complaint and in accordance with the provision "as otherwise determined by the Postmaster to be desired" by the plaintiff or the claimant. The complaint goes on—to again refer to the complaint—in Paragraph VIII it says:

"Unless restrained by this Court, the defendants will destroy the copy of 'A Proposal Concerning The General Line of the International Communist Movement' if a reply to POD Form 2153-X is not received by August 2, 1963. Unless enjoined to do so by this Court, defendants will not deliver said literature to plaintiff unless he requests delivery and complies with the requirements of 39 U.S.C., Section 4008."

The allegation of that paragraph is completely negated by the facts of what occurred. The matter that was involved was delivered to him and there was nothing that the Court actually could restrain in the way of destruction of any mail matter that was the basis for the filing of the complaint.

The question of the unconstitutionality of the statute is one, of course, of considerable seriousness, and I think that I might at this time refer to the Supreme Court decision which is the basic premise on what I think I might consider, and the case was cited by the plaintiff in his [fol. 90] memorandum, and I think it kind of gives a guide line as to what is to be determined in this sort of thing. It is the case of *Massachusetts v. Mellon*, 262 U.S. It is found at page 447, but I would like to quote from page 488 in which Justice Sutherland states:

"The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may direct, control or restrain the action of the other. We are not now speaking of the mere ministerial duties of officials—" citing *Gaines v. Thompson*. "We have no power per se to

review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way [fol. 91] of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess."

I particularly like this particular point: "Looking through forms of words to the substance of their complaint," which I think is essentially where we are here right now, looking through the form of words. And I might say the memorandum which was filed by the plaintiff I might characterize as something like a Whitman [fol. 92] Sample box. He quotes from many, many cases that have been in the Supreme Court on all sorts of things from pornographic literature to matters involving civil rights, and so on. We can go on endlessly with the extent to which we can cite opinions of the Supreme Court in five to four decisions.

With regard to the matters pertaining to the communist

matters, I think the Court is probably well aware of the Internal Security Act, the Immigration and Nationality Act, the extent to which matters pertaining to deportation have invoked the Supreme Court's attention, and this is going back to *Rowoldt v. Perfetto* and *Harasaides* cases, one of which I brought down with me which indicates the extent to which one might cite innumerable other opinions, but this is the *Communist Party of United States of America v. The Subversive Activities Control Board*, 267 U.S. 1, which is a good example of the extent to which we have become involved in the rules relating to the problem which seem to have become so very difficult with regard to the activities of the Communist Party or the extent to which civil liberties and so on are currently involved.

Purportedly you have something here which is related to the Constitutional guarantee of freedom of speech and the First Amendment and the Fifth Amendment.

To come back again to this complaint and the form of words in which he has put his claim by which he seeks to obtain relief in this court, I mentioned Paragraph V in [fol. 93] which he said he desires to receive this piece of mail which would have been the subject matter or the res upon which this Court might exercise its power to enjoin the defendants. But that was delivered to him so there is no longer anything that this Court needs to enjoin the defendants with regard to that subject matter.

The plaintiff goes on and says:

"Plaintiff is informed and believes and on this basis—" And this is in Paragraph VI—"alleges, that one or more of the defendants maintains a list or card file of those persons who signify a willingness to have delivered to them 'communist political propaganda' and that if plaintiff signifies a willingness to accept the material described in Paragraph IV above, or similar publications, that his name will be added to said list. Plaintiff does not wish to have his name on any list of persons signifying a willingness to accept 'communist political propaganda' because the presence of his name on such a list will unfavorably and unfairly stigmatize him as a person who desires to have Communist propaganda sent to him and there-



fore might be in the category of persons considered disloyal to the United States of America, 'soft on Communism,' weak-minded, and other derogatory categories all to his embarrassment and damage to his [fol. 94] reputation and ability to earn a livelihood."

That is essentially the sum and substance of what is now before this Court. However, this is all conclusion as far as the pleader is concerned, that it will unfavorably and unfairly stigmatize him. What actually is involved is that Congress has passed an act here which is related to communist propaganda. It is in line with the congressional authority with regard to the mail, which I have in the memorandum filed indicated that that is a proper power of Congress.

And we also can well be apprised of the presence of receipts of large quantities of material which can be characterized as propaganda in this country might be well the subject of some consideration by Congress in order to maintain some control over them. But in any event, the Congress of the United States enacted with regard to "mail matter, except sealed letters, which originate or is printed or otherwise prepared in foreign countries and which is determined by the Secretary, pursuant to rules and regulations to be promulgated by him to be communist political propaganda shall be detained by the Postmaster upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mail, and the addressee shall be notified that such matter has been received and will be delivered only on his request, or is otherwise ascertained by the Postmaster to be desired by the addressee."

There is nothing said about any kind of a list in that [fol. 95] statute. The matter that is alleged in Paragraph VI on information and belief is not related to any portion of the statute which Congress has prescribed: that a list shall be made of all these individuals that shall be kept and shall constitute something of the nature of the charge that the plaintiff has set forth here. I say that the matter contained in that paragraph VI is purely a figment of the plaintiff's imagination and constitutes nothing.



ing more than conjecture, conclusion, not even a suggestion of a fact.

Judge Zirpoli: May I ask a question, Mr. Collett?

Mr. Collett: Yes.

Judge Zirpoli: How can the Postmaster carry out the mechanics of the act without a list?

Mr. Collett: Without a list?

Judge Zirpoli: How can he carry out the mechanics of it?

Mr. Collett: It would seem necessarily if an individual desires to receive it that some sort of a file would necessarily have to be maintained to refer to. In other words, if we consider the orderly procedure and orderly manner in which to execute the mandate of Congress—

Judge Zirpoli: I am not necessarily saying that it is wrong to keep a list; I am just inquiring how you can do it without a list.

Mr. Collett: I am saying necessarily, in order to manage, you would have to maintain a file of some kind or other—

[fol. 96] Judge Bone: I don't want to be confused by the word "list." In short, what it means, he writes a letter—

Mr. Collett: A card is sent out as set forth in the complaint.

Judge Bone: They come into offices by the thousands.

Mr. Collett: That is right.

Judge Bone: Maybe the Postmaster has a box where he puts those things so in case some question is raised he can say, "This fellow's mail is to be delivered to him at his request."

Mr. Collett: That's right, or it is desired by him.

Judge Bone: Or desired, and those expressions appear throughout the arguments and in these pleadings.

Mr. Collett: That's right. In other words, necessarily in order to proceed in an orderly manner as we would have to assume—

Judge Bone: Well, what we must assume—I assume myself, maybe, a bit—but it is perfectly lawful for him to receive communist literature in the form covered if he merely indicates that he wants to get it.

Mr. Collett: That is right.

Judge Bone: He is not charged with a crime merely because he got it.

Mr. Collett: Nothing whatsoever. There is no crime of any kind charged; it is simply to facilitate the disposition [fol. 97] of what undoubtedly must be a tremendous amount of material. I don't know the extent to which this mail matter comes in, but it is a matter of controlling the mail which is taking advantage of not the regular sealed mail rate but it is an open mail envelope. There is a tremendous amount of that material coming in, and of course it means that if it is going to be permitted to be handled regularly without some attempt made to separate it from all of the responsibilities of the mail service, and Congress has enacted a statute that indicates that in the case of communist propaganda the Postmaster General shall do certain things and Congress has said that it shall be delivered to the addressee. There is no restriction upon it if the individual desires it.

Judge Zirpoli: Could I ask you another question, Mr. Collett? Is there anything in the legislative history that is intended to protect John Smith who doesn't want to receive communist literature?

Mr. Collett: All he has to do is to say that he doesn't want it.

Judge Zirpoli: He doesn't have to say anything if he doesn't want to, but what I am driving at: Is there anything in the legislative history to show that this act is intended to protect John Smith who doesn't want it delivered to his apartment or to his home where everybody can see that he is receiving communist literature, and [fol. 98] therefore it will be delivered to him? Is there anything in the Act of that nature?

Mr. Collett: If the Court please, this volume came by mail the day before Christmas along with the plaintiff's memorandum. I have plowed through some of it but I can't answer Your Honor's question. There are innumerable reports and statements made therein, and it seems that Congress did have in mind any number of these considerations, but to point to where it is specifically so stated—You can quite readily see that they are looking at it from another direction, that is, looking out another window. In this instance we have an individual who de-

sires to receive it, but he is here saying that because he says he wants it he is going to be stigmatized somehow or other, but the question asked by Your Honor I think could be very properly raised.

Judge Bone: Mr. Collett, I intended to ask you the same question. Is there anywhere in the history of the Post Office Department where a man has been harmed by this kind of business?

Mr. Collett: I know of none.

Judge Bone: This case is unique, *sui generis*; it comes here with no background of information. Neither side produced witnesses. Sometimes I wonder why they impaneled these three-judge courts, with not a scintilla of evidence or witnesses of any kind to give the court any information. We are the last people on earth, apparently, who [fol. 99] get the information. This is a nice way to try a lawsuit in an American court.

Mr. Collett: If the Court please, on the question of a three-judge court being impaneled, I did call to the attention of the court below the Martinez-Mendoza case.

Judge Bone: I know, but they want to put the burden upon us of ordering these men to come up and testify!

Mr. Collett: The thing is when a matter is—

Judge Bone: We can do it if we have to, but why put that burden on the court?

Mr. Collett: What I was going to say is that the Martinez-Mendoza case—perhaps Your Honor may recall it and the other expatriation cases of which we have had a number in this court—the one involving an individual departing from and remaining out of the United States to avoid military service. It was down in Fresno and was heard by a single judge and the question was whether or not because it involved constitutionality it should have been heard before a three-judge court. And of course the whole problem of whether a three-judge court is convened in a particular case seemed to me to be rather carefully and specifically indicated in that case. The idea is that a single judge should not have the power to declare an act of Congress unconstitutional.

Judge Bone: Yes, I was quite familiar with all of that before I became a member of Congress myself. They didn't want one judge upsetting a state or a federal statute, so

[fol. 100] these three-judge courts were set up as expediting courts.

Mr. Collett: It says:

"Whether an action solely for declaratory relief would under all circumstances be inappropriate for consideration by a three-judge court we need not now decide, for it is clear that in the present case the congressional policy underlying the statute was not frustrated by trial before a single judge. The legislative history of Section 2282 and of its complement, Section 2281, requiring three judges to hear injunctive suits directed against federal and state legislation, respectively, indicates that these sections were enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order. Section 2281 was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conventional suit in equity."

The whole impact of the three-judge court is the injunction. The statute is being enjoined and the enforcement of the statute is being enjoined; in other words, going from the legislative to the executive to the judiciary, we are enjoining the executive department from enforcing a proceeding to implement by execution the act of Congress on the contention that it is unconstitutional; and that is what calls for the convening of a three-judge court.

Again in this case, as I pointed out, the first statement says that this is a suit for declaratory relief and to enjoin the enforcement of 39 U.S.C. Section 4008, but the paragraphs I have already read more specifically related to this piece of mail, and that piece of mail was delivered to the plaintiff, into his possession, on his desire in accordance with the statute—his expressed desire. He expressed in his complaint that he desired to receive it. It was delivered to him. Therefore, at that particular point what is there to be enjoined that would call for the invocation of a three-judge court? The injunction was denied.

Judge Bone: I don't think he probably would deny that.

If he does, we will produce him in court and put him under oath. But his complaint seems to be that the local Postmaster maintains some kind of a record or list, or whatever you want to call it, of names. That is the real guts and heart of this case.

Mr. Collett: That seems, cutting through the words, to be the gist of the case.

Judge Bone: Now, concededly the man has asked for the mail. He has requested it.

Mr. Collett: He desires to receive it.

Judge Bone: He desires to receive it. Well, what is [fol. 102] the difference between that and requesting it? I am not going to bandy words. We are not here to get into the realm of semantics. He requests or desires; what's the difference?

Mr. Collett: That's right. But he goes on in Paragraph VI and he builds up what I would say is something in the nature of a bogey man: "That plaintiff does not wish to have his name on any list of persons signifying a willingness to accept communist political propaganda because—" "Because," he says, "the presence of his name on such a list will unfavorably and unfairly stigmatize him as a person who desires to have communist propaganda sent to him—"

Judge Bone: That is his assumption. He avers it on information which he says he believes, and he doesn't produce anybody who told him that. Let's produce that fellow, the red squirrel who ran under the barn. Why come into court with half a disclosure of these things? If your opponent has some evidence, let him produce it. I would like to quiz this fellow who told him there was a list in the post office, and find out how much he knows. Or do they want to conceal that? Do you want to conceal it? Does anybody want to conceal it? Let's have no concealment in this case. You have got the lid off now and let's look down into the case and see what's in it, at least so far as I am concerned. Bear in mind, Mr. Collett, I am not speaking for my two associates. They are kindly gentlemen and they may not share my vigorous views about [fol. 103] prying into these things. Maybe it is a hang-over from days in the D.A.'s office where I want to get at facts, and trying criminal cases for years. I don't want



anything concealed. We are here now and let's have the lid off.

Judge Wollenberg: Your two associates have had the same experience.

Judge Bone: Here I have two gentlemen with me—I should shudder when I think of it—who lived around the D.A.'s office. They didn't call them D.A.'s up in my country but they performed the same functions. They enforce the law here in a slightly different way in California than they do in the state of Washington.

But what is the purpose in trying a case here where averments of fact in a vague sort of way are put before the Court and no testimony of any witness or no substantial documentary evidence of any kind is produced?

You may wrestle with that.

Judge Wollenberg: May I point out that before Mr. Collett took up the list, just at the start of the hearing he stated that some subpoenas have been issued, so probably somebody intends to produce some evidence or did intend to.

Mr. Collett: I mentioned that Mr. Krause did serve the Postmaster, Mr. Fixa, personally with a subpoena which was directed to—

Judge Zirpoli: Assuming all these things to be true, [fol. 104] and assuming that this Court would go so far as to say the act was unconstitutional, what would the Court have to do to implement it?

Mr. Collett: Well, that is a very interesting question.

Judge Zirpoli: What would the Court have to do?

Judge Wollenberg: That is what is bothering me.

Mr. Collett: I don't know, Your Honor. I don't know what you can do. As far as I can see, this is a matter that would be essentially a declaration that the act is unconstitutional—just a declaration.

Judge Bone: I am sure that would entertain Congress to find three federal judges out here saying an act of theirs was unconstitutional. I don't think they would particularly care for that kind of a declaration and we would want to be on mighty solid ground in pronouncing it.

Mr. Collett: That's right.

Judge Zirpoli: Is it your contention that ultimately all we can do is to issue an injunction, and there is no need



for an injunction in this case, and therefore there really is no controversy?

Mr. Collett: That is about what I find to be the case: that there has got to be something specific here with regard to this individual and there isn't anything. What they are seeking to get is a general type of determination as related to the entire population that this statute is unconstitutional, period. There is no res before this Court; there is no subject matter; there is nothing upon which you are going to proceed. There is nothing in the statute with regard to any kind of a list. If we had regulations promulgated which required certain things and he attacked those as being unconstitutional, as was done in the waterfront case, *Parker v. Lester*, for instance, regulations promulgated by the Coast Guard in which you attack them as being unconstitutional because they don't do this or do that or the next thing. But there is not that in here. There is nothing in the complaint which concerns any averment to that effect. In fact, there is nothing in the statute that calls for anybody to make any kind of a list. But as Your Honor Judge Zirpoli pointed out, which I would concede, that necessarily proceeding in an orderly manner to execute the responsibilities imposed by Congress upon you, necessarily if you seek to find out who wants to get this stuff and "A" says, "Yes," and "B" says "No," then you just don't throw it into the waste basket. There might be two or three, there might be an entire pattern of this sort of thing, and there may be individuals, as Your Honor pointed out, who would have no part of it, and would write back and say, "Why do you ask me about this? I don't want any part of it. I would like you to know very definitely that I will have no part of this communist propaganda." As we well know, in the last several years the extent to which any kind of affiliation [fol. 106] supposedly, we might say, with regard to communist activities, and so on, is injected into political matters, and so on. I suppose that that constitutes essentially the basis of what he is trying to indicate here by some sort of inference.

Judge Zirpoli: Is there also any indication of the volume of mail which became a burden on the mails so that if they

were discouraged to send propaganda here, some of the burdens upon the mail would be relieved?

Mr. Collett: There is some discussion in the committee hearings with regard to that phase of it, and I must say that I am sorry that I haven't been able to get through that entire document to be able to point out specifically to the Court what is in it. There was such a volume of reading matter coming in, particularly over the holiday season, I haven't been able to do that.

But I believe the question is well directed, and I think we would have to, for the purposes of my argument, presume that Congress in its endeavor to perform its functions has taken into consideration the volume that is indicated in that particular document, and it indicates also that they have given very extensive consideration to the matter of this particular statute.

The plaintiff in his memorandum indicates that in 1961 a previous statute was discontinued. I am not particularly advised on that matter.

[fol. 107] Judge Bone: Mr. Collett, would you concede, or is it your idea that the unconstitutional aspect of the statute that is claimed here is due to the fact that such a list as he suggests has been created? What else does the unconstitutionality of the Act relate to? What does that argument relate to?

Mr. Collett: With regard to the list?

Judge Bone: Yes. Is that what he claims makes the Act unconstitutional?

Mr. Collett: That, as far as I can see, is the only thing that is left in this case.

Judge Bone: This is the thing that intrigued me from the very beginning. I want to know why an act of Congress is unconstitutional because of this "list" argument, and that rests on a man's statement that he has heard or been informed that there is a list, and therefore he avers it to be true. I think that there isn't a line of evidence anywhere to prove that it is true. I don't know whether there is a list or not.

Mr. Collett: Supposing, as we do on a motion to dismiss, admit that the Postmaster necessarily, in performing his functions, you will have to presume that he has a filing system—

Judge Bone: I suppose if he got a letter, he wouldn't want to throw it away because he might think, "This fellow will write again and maybe I had better put the letter in a drawer or box or somewhere where I keep that kind [fol. 108] of mail." If there is a formal list—I don't know whether his contention is that there is a card index or that the letters are all filed alphabetically, or what. I would like to know. I don't like to have counsel come in court and aver something on some sort of information. I want to know about the informant, and I intend to learn, if there is any way of doing it in this case. I hope my associates don't impeach me in the meantime for asking this, but I assure you, sir, I am going to find out before we are through with this who this informant is. Bring him up here and let him talk.

Mr. Collett: Might I refer again—

Judge Bone: If counsel don't like that, that's too bad. That's what's going to happen, I can tell Mr. Krause that.

Mr. Krause: Judge Bone, we are prepared to present evidence; we are prepared to present—

Judge Bone: Well, why didn't you do it before? Why precipitate this hearing when you might have settled it in a lower court and perhaps gone up through the Circuit Court of Appeals instead of invoking a three-judge court to hear this case? That is the way the law is, I'll admit. I am not criticizing it, but I am simply saying you could have short-cut this thing. But here we have gone to the trouble here, if you can call it that, of invoking a three-judge court to challenge the constitutionality of an Act that rests on the assumption that somebody informed this fellow something.

[fol. 109] Judge Zirpoli: It just occurred to me—

Judge Bone: I don't know what Congress would do with that. If you think you are aiding free speech, you are making a mistake. We are told by the most prominent men in the country, including the Whitehouse himself and the members of Congress, that the international communist conspiracy is the most dreadful threat against the perpetuity of this republic. Do you expect people to sit around and not even think about it, particularly Congress? If you do, you are making a sad mistake. I, having served

in that body, know its reactions. Why do you think they passed all these laws? Just to be doing something?

Now, are we to believe Mr. Kennedy and Mr. Johnson in the Whitehouse, that this is the most deadly threat ever aimed at this country and the world trembles on the eve of something rather drastic, or are they lying? I don't like those things being bandied around in a court with no substance. Let's produce the substance.

Maybe I had better give you gentlemen a chance to think this thing over and decide who will produce somebody who will give us some information. We have the authority to take testimony.

Mr. Collett: For a moment, Your Honor, keep this in mind—a few more things with regard to this complaint.

I have mentioned "as hereinafter set forth" in a [fol. 110] couple of these paragraphs, and on page 6 is the "Allegations of unconstitutionality by both plaintiffs." Mr. Krause had a cause of action in here also which was dismissed by the lower court. Mr. Krause alleged that he had in his possession a certain magazine entitled, and so on, which was mailed to him, and he was informed and believes and alleges that the defendants in this action have determined pursuant to authority granted them under the same statute that each and every issue of the Peking Review is "communist political propaganda."

He goes on to state that he desires to deposit unsealed in the United States mail his copy of the Peking Review and the New York Times—Western Edition. He desires to deposit said mail unsealed because the postage fee required for unsealed mail containing newspapers or periodicals is substantially less than the postage fee required for sealed mail. "Plaintiff wishes to address the copies of said publications to a friend residing in the United States who has not indicated a desire for said publications, does not subscribe—" and so on. That was dismissed.

Then in the complaint in a separate section he says that the allegations of unconstitutionality by both plaintiffs are—This is Paragraph XVI:

"39 U.S.C., Section 4008 is unconstitutional and void on its face and said fact should be declared by

the judgment of this Court and the defendants herein [fol. 111] perpetually enjoined from enforcing its provisions."

Now, again we have that generality. This isn't anything specific, but that the defendants be perpetually enjoined from enforcing the provisions of Section 4008 "for the following reasons:

"1. It violates plaintiffs' rights to freedom of speech, press, association and privacy as protected by the First Amendment to the Constitution of the United States.

"2. It deprives plaintiff Lell Heilberg of due process of law under the Fifth Amendment to the Constitution of the United States because the exemption of officials of the United States Government agencies, public libraries, colleges, universities, graduate schools, scientific or professional institutions for advanced studies, is an arbitrary classification discriminating against him and categorizing him into a group assumed to be less able to distinguish propaganda than other persons similarly situated as to ability, education and political understanding.

"3. It violates the due process clause of the Fifth Amendment to the Constitution of the United States because the standards for the determination of what is 'communist political propaganda' are vague, uncertain, and do not provide the opportunity for [fol. 112] notice or hearing."

Then he says:

"Plaintiffs have no adequate remedy at law to protect them from the effects of said defendants enforcing 39 U.S.C., Section 4008——"

I state, with due regard and respecting Your Honors' comments, that this complaint, as I pointed out in one of the decisions with which the Court is familiar—that you don't invoke a three-judge court just on an idle proposition; that if you are taking the time of three judges to come in here and spend the time and do a great amount of



work, it is a matter which is serious, in an endeavor to perform their function, which I have indicated from a statement in *Massachusetts v. Mellon*, that this Court is asked to set aside or declare unconstitutional an act of the legislative body and that it should not be done upon an idle or inconsequential matter. And I think a reading of this complaint as well as a statement of the words of what is involved here, that this is not a matter which a serious-minded individual really seeking to attack the constitutionality of an act of Congress of the United States would seriously present before a three-judge court; that this is jousting with something—I don't know how to otherwise characterize it; it is a little bit out of character perhaps, pertaining to something that would be a more personal kind of remark, but to my mind, you must take seriously the position of the Government of the United States in the performance of its functions and its respective departments that it calls for the pure-minded people to present problems that are substantial in nature to a court in order for it to make a proper determination; and I don't think that there is anything before this Court acting upon which to go forward and endeavor to have a trial and to again call for the attention of this Court to give all of the research and so on to the extent to which I indicated counsel can recite the opinions of the Supreme Court would take an enormous amount of time to read and understand. But we have nothing here. The material that he has said he wanted, he has already got it, period, and will continue to get it from here on, and on that ground I think that the motion to dismiss should be granted.

Judge Bone: Perhaps we had better have a five-minute recess before we hear from counsel on the other side.

(Recess.)

#### ARGUMENT ON BEHALF OF PLAINTIFF BY MR. KRAUSE

Mr. Krause: Your Honors, I am Michael Krause, one of the attorneys for Mr. Heilberg. I am not going to answer Mr. Collett's argument at this time except to say that a three-judge court is necessary for—

Judge Zirpoli: May I ask you a question at the outset?

Mr. Krause: Yes.



Judge Zirpoli: I notice in affidavits that are on file here that there are presumably cases pending in other [fol. 114] districts.

Mr. Krause: Yes, Your Honor.

Judge Zirpoli: Instituted by the American Civil Liberties Union?

Mr. Krause: No, Your Honor. One of them was as counsel the Southern California Counsel for the American Civil Liberties Union.

Judge Zirpoli: What about that New York case?

Mr. Krause: In the New York case counsel does not have any connection with the American Civil Liberties Union as far as I can determine.

Judge Zirpoli: Were those cases filed before this case?

Mr. Krause: One of them was and one was not.

Judge Zirpoli: Don't you think the decision there would have been sufficiently determinative without the necessity of invoking another three-judge court, considering the backlog of cases that we have in the courts? Isn't the very nature of this case such—

Mr. Krause: I am quite conscious of the use of judicial manpower.

Judge Zirpoli: Here we are using nine judges to decide this question, presumably, instead of three.

Mr. Krause: No, Your Honor. Let me say this, Your Honor. This isn't in these affidavits, but as a matter of [fol. 115] fact, I know in these other two cases that a three-judge court has not been convened. This is the case that is further advanced. The other cases have been quite delayed by procedural matters and in no other case has a three-judge court been convened. It may be that those other cases will be adjourned pending this case, which would be the logical thing, since this is the furthest advanced. But my client is in this district and also has a right to have his case determined regardless of any other cases, Your Honor. But this is the furthest advanced case and this is the one which I think presents the issue in the clearest terms. I have examined the pleadings in the other two cases and I am not satisfied with those pleadings. I am satisfied with my pleadings, not with some other lawyer's pleadings. I don't want my case determined on some

other lawyer's pleadings. That is the best of my ability, Your Honor, to answer you.

Judge Zirpoli: Proceed.

Mr. Krause: No district court could consider the complaint without a three-judge court once it has been determined that a substantial constitutional issue is presented, which it has been determined.

The Government is controverting the allegations of our complaint, which takes us into the realm of summary judgment, as I understand Federal Rule 12(b). Therefore, we want to present testimony to controvert some of those [fol. 116] affidavits and to establish facts as alleged in our complaint for the purpose of resisting this motion to dismiss on the basis of mootness, and first we would like to call Mr. John Fixa who has been served with a subpoena.

Judge Zirpoli: Would you care to indicate to the Court what your offer of proof is?

Mr. Krause: Yes. Our offer of proof by Mr. Fixa is that there is a list of persons who have signified willingness or desire to receive communist political propaganda. This list is kept pursuant to the necessary implications of Section 4008 which we are attacking in this case.

Judge Zirpoli: May I inquire further, assume for a moment that there is a list, and assuming that there is a list, why shouldn't the Court still dismiss this complaint? What benefit are you going to get by any conceivable injunctive relief that this Court can give you?

Mr. Krause: Let me say that the list is merely one small aspect of this case. It is important to my client, Mr. Heilberg, that his name not be on the list. His complaint said that he didn't want his name on the list, and the Government then has what I consider the gall to consider this complaint a desire to be put on the list when his complaint says that he doesn't want to be put on the list.

Judge Zirpoli: May I ask, what is the benefit that your client is going to get from any possible injunctive relief [fol. 117] that we may give?

Judge Wollenberg: In other words, what is the nature of the injunctive relief that you are seeking from us?

Mr. Krause: All right. In the first place, this Court could enjoin these defendants from putting Mr. Heilberg's

name on a list and causing him the disadvantages which we alleged in our complaint and which for the purposes of this motion must be considered as true. That is the first thing that could happen.

Secondly, the operation of this statute as applied to Mr. Heilberg could be enjoined for these reasons: Number one, it delays the receipt of his mail; number two, it is—and we are prepared to prove that, Judge Wollenberg, that the operation of this statute delays the receipt of his mail and also operates as a search of his mail, both of which are personal rights in property which Mr. Heilberg has a right to protect.

Thirdly, the injunction of this Court could enjoin the operation of this statute as a censorship provision violating the First Amendment.

We say that the Government of the United States operates under delegated powers as given in the Constitution. Nowhere in the Constitution—and I include the right to run a post office—is the Government given the power to label mail and tell the citizens of the United States what is and what is not propaganda. This is a judgment for the citizen to make.

[fol. 118] When the Government makes that judgment and tells a citizen or all citizens, this is an illegal operation of the government which the courts are empowered to stop. It hurts my plaintiff and it hurts all citizens who are similarly situated.

Unfortunately, I don't believe there is an ascertainable class here or else this could have been a very good class action. But the group that receives mail from foreign countries I don't believe is a sufficiently definite class, and therefore this is not a class action.

But as we have shown in the civil rights cases, the courts have given injunctive relief on the behest of one plaintiff to benefit an entire class because the entire class' rights are involved here. This is just a summary of what the court—

Judge Zirpoli: Isn't this more theoretical than it is real?

Mr. Krause: No. I think it is very real. I think the Government has attempted to disguise this case when a man files a complaint by going ahead and not applying the statute and giving him his mail and saying, "Well,

you are a special person; you paid \$15.00 in the U.S. District Court and you filed a complaint; therefore we will give you your mail." This is not something the Government should do.

If the statute is valid and legal, they should be [fol. 119] willing to face the test and not attempt something like this.

But we are prepared to prove, number one, that there was no real delivery of this mail; that it was delivered to Mr. Heilberg under such conditions as to belie any request or desire by him for delivery under these conditions.

Judge Zirpoli: This is all past action. What we are concerned about is what we can do or should do in the future. Where in this thing are you going to achieve anything by injunction of this court?

Mr. Krause: Yes.

Judge Bone: Are you asserting to us that he won't get this mail if you don't secure an injunction? Are you willing to go that far?

Mr. Krause: The United States Post Office—

Judge Bone: I know, but answer that question. I don't want to press you too much, but is it your contention—are you now contending to us that this man won't receive this mail from now on?

Mr. Krause: No. I ask for the right to pursue what I am—

Judge Bone: We are applying injunctive relief retroactively. What is before us? The man is getting his mail. How is he going to be injured in the future any more than he is being injured now?

Mr. Krause: I will be glad to answer that, Judge Bone. [fol. 120] We are prepared to prove that Mr. Heilberg continues to get mail from countries behind the Iron Curtain, as a matter of fact, has a voluminous correspondence all over the world; that his mail continues to be processed, opened, searched, labeled and delivered to him.

Judge Bone: How do you know that?

Mr. Krause: Well, we will prove it to your satisfaction. We are prepared to do that. We are prepared to show these facts.

We are prepared to show that this is not the kind of delivery that would moot this case by any means. It is

almost the same as if the Government said, "Mr. Krause, you are getting first-class mail. We will open it, we will read it, and we will make a list of the correspondents to you, and this information will be available to whomever wants to see it, but then we will deliver your mail a few days later. You don't object to that, do you, Mr. Krause?" I would say, "By God, I do object to it. I object to it in the most strenuous terms." And I think Mr. Heilberg has the right to say the same thing, even though this is not first-class mail, but some other kind of mail sent at less postage rates. I think there is a continuing controversy because he is receiving his mail under unconstitutional conditions. The mere receipt—

Judge Bone: What is this unconstitutional condition that you say presently exists? What is it? That he has [fol. 121] notified the Postmaster that he wants this mail, that puts him in the class of a suspected criminal?

Mr. Krause: It puts him in a class of a person who desires to receive "communist political propaganda."

Judge Bone: That is beside the point. Is reading communist literature a criminal offense? If it is, I am guilty of a crime. I read a lot of it.

Mr. Krause: It is not a criminal offense, Judge Bone. It is an offense to his right of privacy and it is an offense to his right to be—

Judge Bone: I might be annoyed if someone asked me if I read communist literature. My answer would be, "It is none of your business; I read it. Now, what about it?"

Mr. Krause: "None of your business." That is just the point here that I am making.

Judge Bone: Oh, no. Your man is in court suing. I wouldn't dignify a thing like that by a suit. My friends would regard me as a silly ass if I tried it.

But anyhow, you know once in awhile it is a good idea for the officials of law to keep an eye on people. We have a dead boy who was a friend of mine who was shot to death by a man. Perhaps if they had looked into that fellow a little more carefully, Mr. Kennedy would be alive today. Do you want to have more handcuffs put on inquiries of any kind? If you do, sir, I do not agree with you, and I [fol. 122] think I have as much respect for law as you and your client. And anyhow, can you call our attention to



any case parallel with this that has been decided by the Supreme Court?

Mr. Krause: Yes, Your Honor, but—

Judge Bone: Oh, no; no, let's not find some analogy somewhere. Has there been a case of the kind when 4008 has been under challenge and the Supreme Court has passed upon it clearly?

Mr. Krause: That section has just come into effect in January of 1963.

Judge Bone: I know, but it is easy to get into the Supreme Court. January of last year.

Mr. Krause: There has been no case challenging the constitutionality of 4008.

And I want to say to Your Honors now, I don't usually enter into arguments with judges about their statements if I can possibly avoid it, unless it has something to do with the merits, but I want to say this: that we would resent it most highly if any aspersions were cast on Mr. Heilberg for bringing this suit in connection whatsoever with any political cause or any maniac that happens to be walking the streets. This has nothing to do with Mr. Heilberg's case and we would like to have it proceed and present our evidence if we may. May I call Mr. Fixa?

Judge Bone: Yes, you may call him.

#### [fol. 123] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Collett: If the Court please, as I announced at the beginning, Mr. Fixa is downstairs. He is available. I felt it wouldn't be necessary for him to be in court here because I didn't consider at this posture of the case we were in a position to take any testimony; that if the Court would rule upon the motion, that it would then be necessary at such time to bring the case into issue; that I expected Mr. Krause would be directing his argument to the motion. He says it has already been determined. It has not been determined. The motion before the lower court was denied without prejudice to renewal before this Court, and it is now still before this Court as to whether or not there is any substantial question to be concluded by this Court on the basis of the complaint that is before it.

Counsel says that the three-judge court has already been



called here. Well, there is a three-judge court, but the issue before the Court is whether or not there is any matter to be presented to this Court that calls for any determination by a three-judge court. I refer to my argument again that I made this morning.

Mr. Krause: Excuse me. Maybe Judge Zirpoli can clear us up on that. It was my understanding that the United States before a single district judge moved to dismiss this case as moot and the motion was denied without prejudice—not without prejudice to again challenging the substantiality of the constitutional issues, but without prejudice as to whether it is moot or not, and I think that was the decision.

Judge Zirpoli: Denied without prejudice as to whether it is moot or not and also as to whether you have a true controversy.

Mr. Krause: Yes, whether there is a cause of action stated.

Judge Zirpoli: There was no doubt in my mind as to the plaintiff Krause that there was no conceivable controversy, and the Court dismissed as to the plaintiff Krause. As to the other plaintiff, the Court denied the motion without prejudice so that it might be presented to a three-judge court, and we are here, at least as I conceive the matter, to pass on the question of mootness and also the question of whether you have a true controversy.

Mr. Krause: Yes, Your Honor.

Judge Zirpoli: And in that connection, as far as I am concerned, I am also here to determine what conceivable basis is there for this court now to indulge in declaratory judgment if the basis for declaratory judgment is injunctive relief and all the benefits that can conceivably be derived by injunctive relief have already been attained by this plaintiff.

Mr. Krause: All right. I agree that those are among the issues that are before this Court now.

[fol. 125] Judge Zirpoli: They are the basic issues. Whether there are many more included, they are basic.

Mr. Krause: But my point is that the issue as to whether there is a substantial constitutional question for which to convene a three-judge court is not before this court, because that has been passed—that question is past.

Judge Zirpoli: That is merely the purpose of convening the court; that doesn't preclude the court from, once being convened, concluding that there is no true controversy.

Mr. Krause: I am in agreement with that, Your Honor.

And may I say that Mr. Fixa was subpoenaed to be in this court at 10:00 a.m. and I don't know of any excuse why Mr. Fixa should not be here right now.

Mr. Collett: May it please the Court, I took the precaution to advise the Court, and his representative is here. Mr. Fixa is an executive officer of the United States and is a busy man.

Judge Zirpoli: I don't know how my colleagues feel. I don't believe there is any need for any excuse on this question. You made your point at the outset of the hearing.

Judge Wollenberg: Did you say you have a representative who is familiar with all of the information or something?

Mr. Collett: His representative is here. I can get Mr. Fixa up here if the Court wants to have him here. What are we calling Mr. Fixa for if we are assuming that Mr. [fol. 126] Fixa has a list?

Judge Bone: As far as I am concerned, I can only assume that Mr. Fixa has a box where he puts these letters.

Mr. Collett: Well, what about the postman, if it is determined that an individual desires to receive the mail?

Judge Bone: Of course, we can't enjoin the postman on his route very well. He hasn't asked for that. Maybe we ought to bring the postman with him because he is familiar with the fact that this literature is being distributed to this man. Do you want the postman on his route to be enjoined, Mr. Krause?

Mr. Krause: I think if Mr. Fixa is enjoined, that will be sufficient to handle the problem.

Judge Bone: That will be a novel idea but maybe—

Judge Wollenberg: What are we going to do? Mr. Krause is calling Mr. Fixa.

Judge Bone: It is getting pretty close to noon. Maybe we ought to go over—

Judge Zirpoli: I would suggest, if I may, gentlemen, that we defer calling Mr. Fixa and permit Mr. Krause to continue his argument. I am still interested in the basic question: Assuming that there is a list, and the basic ques-

tion that I indicated before, what basis is there for declaratory relief if everything that could be achieved by the actual issuance of an injunction itself has already been achieved?

[fol. 127] Mr. Krause: All right, Your Honor. If the Court wants to defer the calling of Mr. Fixa, I have no power over that. In my mind, I would call Mr. Fixa right now. If the Court wants to defer that, we will go ahead.

Mr. Collett: If the Court would excuse me, you have allegations in your complaint. On a motion to dismiss I think it is more or less a well-recognized principle that for the consideration of the motion well-pleaded factual allegations are to be taken as true. Now, if we can take that—

Judge Zirpoli: That isn't the point. The point is mootness of the controversy. Your question of mootness cannot be determined from the pleadings alone. It can be determined in part from the record, which includes also the ruling of Judge Burke, but it cannot be determined from the pleadings alone. If that were the fact, we wouldn't have any problem at all this morning.

Mr. Collett: Then to what extent—The fact that Judge Burke's order is in the record and the concession by counsel at that time. He was there and he was given the opportunity to present whatever he had and the subject matter is closed, as Your Honor—

Judge Zirpoli: That is why I suggested that Mr. Krause proceed with his argument and we will see what he has to say, in view of the observations that I made, and maybe we will be in a better position to determine then the need [fol. 128] for the testimony of Mr. Fixa.

Mr. Krause: All right. Let me say this: There was no concession that the mail was accepted. The only concession was because of the confusion surrounding this particular package, this particular package that Mr. Collet was delivering, is an absolute—

Judge Zirpoli: I know, but whether he accepted it or not, this is a rather technical argument. It was there and it was available for him, and this is picking at straws now when you are making your argument on this point.

Mr. Krause: I want to make it clear that we do not concede that it was delivered as we desired it.

Judge Bone: Are you putting it on the technical ground that a uniformed postman did not deliver it? You were in court all morning there with Mr. Collett and some of that stuff that he is arguing about and debating about, but must we wrestle with things like that? I am ill-disposed toward wasting time in trying to figure out the reason for certain postures that will arise in the case. What's the difference? The fellow got the mail. He said he wanted it. He wanted to receive it.

Mr. Krause: To our mind it is the same thing as handing a piece of mail and saying, "Now, if you accept this piece of mail, you realize that——"

[fol. 129] Judge Bone: Oh, no, no. You are drawing on your imagination there. It is not the same, sir.

Mr. Krause: It was not an unconditional delivery.

Judge Bone: Don't make that argument with the idea that it is going to find response in my soul.

Mr. Krause: My point is that this wasn't an unconditional delivery, the same as if someone delivered a package to you and asked you to sign a slip saying that you owed ten dollars.

Judge Bone: Did they ask this fellow to sign a slip?

Mr. Krause: It is different, and we maintain that this mail has been and is being and will be in the future delivered under unconstitutional conditions after it has been searched——

Judge Bone: Did anyone in court ask you to sign a slip of any kind?

Mr. Krause: No, sir.

Judge Bone: In other words, if I handed you a package in this court, why, I didn't deliver it to you unless I got a receipt from you in order to lay the foundation for some idea? The man got the mail and he is now getting it. That is what Judge Zirpoli is talking about.

Mr. Krause: All right.

Judge Bone: He will continue to get the mail.

Mr. Krause: We also have Mr. Heilberg in court, and ordinarily I would call him next—but I presume the Court [fol. 130] would prefer to hear argument before any testimony.

Judge Zirpoli: Well, what is he going to testify to?

Mr. Krause: He would testify that he has in the past

received considerable mail from all foreign countries. As a matter of fact, his unofficial job requires him to receive mail from foreign countries. He is a director of his particular organization which is the International Esperantes Union, and he expects to continue to receive mail from all foreign countries including Russia, China, Bulgaria and other countries.

Judge Zirpoli: I assume Mr. Collett will concede all this.

Mr. Collett: Yes.

Mr. Krause: All right. And we expect to obtain testimony from him concerning the kind of delivery—delivery in quotes—which was made in Judge Burke's court and the fact that he did not accept that delivery. We expect to introduce certain evidence—

Judge Zirpoli: This is an expression of his intention. Aside from the expression of his intention, do you intend to controvert the statement contained in the finding of Judge Burke?

Mr. Krause: No; the mail was tendered, and that is all that Judge Burke found. Judge Burke found that there was a delivery of the mail, not that it was accepted. That order is quite clear, and I think we should present that order to the court in three copies along with the transcript [fol. 131] of the hearing before Judge Burke, and I will undertake to do that. But the order is quite clear, that Judge Burke said that the package was "released" in court; he doesn't say that it was accepted in the order.

Judge Zirpoli: All right, what is the issue as to proceeding with your first witness? I think everything you say is pretty well conceded. What is the other offer of proof on the part of the plaintiff?

Mr. Krause: That he does not want to be on any list; that he has received indications showing that he is involuntarily on the list whether he wants to be or not; and that being on the list would have undesirable consequences since he is not a citizen of the United States. He expects to apply for citizenship. This may be used against him. Since his business relations are delicate and as such, if it should ever be publicized that he is a recipient of communist political propaganda by some government agency, he would suffer irreparable harm. And he has the right to privacy. He doesn't want the government or anyone else knowing



what his mail is<sup>a</sup> and he doesn't want the government or anyone else labeling his mail or telling him what is or is not communist propaganda. That is what we would prove by Mr. Heilberg.

May I call on Mr. Blease, now to answer your question, Judge Zirpoli, because we have undertaken a split in this work and he will answer the question of what this court could do.

[fol. 132] ARGUMENT ON BEHALF OF PLAINTIFF BY  
MR. BLEASE

Mr. Blease: May it please the Court, my name is Coleman Blease. I would like to address myself to what appears to be the merits of this case and the posture of this case at this point.

There are three separate and outstanding facts which are the subject, we believe, of injunctive relief and we have already mentioned some of them, but let me summarize.

If you accept our contention that the mail was not in fact delivered to the plaintiff, that the mail is still in existence, that the mail is still in the constructive possession of the Government, then an injunction can force or compel the Government to go and find that mail, unlabel it, or, rather, deliver it free of the labeling process which is being challenged.

The mail has not been destroyed so far as we know. The mail was abandoned in the courtroom. That's one, and only one, subject of injunctive relief.

Secondly, the plaintiff has received mail—

Judge Zirpoli: Is that act of abandonment the act of the government or the act of your client?

Mr. Blease: It is our contention that the abandonment was an act of the government.

Judge Zirpoli: Have you any right to claim now with relation to that specific mail?

Mr. Blease: Yes, we do, and for a number of reasons, [fol. 133] Your Honor.

The legal delivery, we contend, depends, among other things, on whether the statute which is in issue here permitted such delivery. The statute is quite specific about that. May I refer to the complaint?



In Paragraph IV there is contained the statement of the message to the addressee. The message says:

"This office is holding unsealed mail matter addressed to you from a foreign country. The Secretary of the Treasury has determined this mail to be Communist political propaganda. It cannot be delivered to you unless you have subscribed to it, or otherwise want it."

Now, the statute—and I believe this is an accurate reflection of the requirements of the statute—the statute says you cannot receive this particular mail; it cannot be delivered unless you are willing to sign a statement that you want mail which has already in fact been seized first and labeled as communist propaganda.

Judge Zirpoli: It says more than that, though.

Mr. Blease: What?

Judge Zirpoli: It says "otherwise express your desire," does it not?

Mr. Blease: It has to be an expression of desire that you want this mail subject to these conditions. I think, if any [fol. 134] thing, our plaintiff refused to sign that—

Judge Bone: Subject to what conditions?

Mr. Blease: Subject to the conditions that the mail be detained, seized, opened, examined, classified as communist political propaganda, and then sent on.

Judge Bone: Are we able to brush all of that out of the law, or is it in the regulations?

Mr. Blease: That is, among other things, the subject of injunctive relief, and if you accept the fact that a single delivery broke the law, then we reach the precise controversy—

Judge Zirpoli: I am pretty well satisfied in my mind—and I am not speaking for the rest of the court now; this is the first affirmative declaration that I make—I am pretty well satisfied in my mind that the mail was delivered; that that tender before Judge Burke was a delivery of the mail; whether the postmaster himself did it or whether his then legal representative, the United States Attorney, did it, it was a delivery. That gives you the premise and the reaction of one judge.

Mr. Blease: I understand your position, Your Honor.

I would say again this is only one aspect of a three-pronged attack on this, and all of this is the subject of injunctive relief.

May I merely add, in response to the comment of Your Honor, that it is our contention that the Government has [fol. 135] had to violate the terms of this statute in order to attempt to moot it; and if that is not the subject of the clean hands doctrine, I don't know of anything that is. In other words, to moot this case, the Government, I think, would perhaps candidly admit that unless they can deal with this case procedurally—

Judge Zirpoli: The Supreme Court didn't intercede in the Massachusetts case in which they presumably had to wink at the law.

Mr. Blease: What Massachusetts case?

Judge Zirpoli: Involving the use of contraceptives and the advice with relation thereto.

Mr. Blease: That was totally irrelevant. The statute there had never been applied. This statute now is applied, and they are applying it again. This statute is not only being applied to the case, but our client, Mr. Heilberg, has received mail, is receiving mail, and expects to receive more mail in the near future, which brings us to the second point of injunctive relief, namely, we are contending, among other things, that it is unconstitutional to detain the mail, to open the mail, to read the mail, to classify the mail by a category which is not an objective category as was applied in *Esquire*, the difference between advertising material and non-advertising material, for example, but a category which reflects upon the quality and the value of the material.

Judge Zirpoli: Who does all this reading—the Post Office [fol. 136] or the Customs?

Mr. Blease: Your Honor, the Customs Office, the Customs Department does that, and I will get shortly to an examination of the statute itself.

And I think, as our pleading will reveal, there is a long line of cases—

Judge Zirpoli: Does Customs not have the right to open anything that comes from outside the United States?

Mr. Blease: They do have the right to open it.

Judge Zirpoli: They do? They have the right to open

anything that comes from outside the United States, regardless of what it is.

\* Judge Wollenberg: If it comes within the boundaries.

Mr. Blease: Let me say this: They do not have the right unconditionally to open everything, and that is the subject of this suit. We are not contending that the Government cannot under some circumstances open mail. For example, we have conceded in many places here that freedom of speech does not reach certain kinds of classifications and registration. What we are contending is that this particular condition is unconstitutional, not that all conditions are unconstitutional, but this particular condition. And therefore we can concede the general point readily because it is not at issue here. All the cases that have been cited deal with mail fraud, deal with obscenity, deal with [fol. 137] incitement to violence, deal with other categories which we concede are the subject of the government's powers or the mail powers, but that is not at issue here.

We are dealing with matter which is not in any of those categories or alleged to be in those categories. It is mail which otherwise is a normal kind of mail coming from particular kinds of countries and has been classified.

So that if you agree with our contention that that is the subject of equitable and injunctive relief to reach not past actions but the immediate and real possibility that mail which he has received and has conceded receiving—and the testimony will reflect the fact that he received additional pieces of mail; we will show that during this time span that he frequently received mail; that he is receiving more mail and this will again be subject to the procedures under the statute, and it is those procedures that we are contesting, and it seems to me that those procedures are clearly subject to equitable relief, if you reach the merits of this case apart from the mootness question.

You may disagree when we reach the merits as to the contentions we are making, but it seems to me that you cannot claim that we cannot reach the merits because there is nothing to reach, there is nothing the subject of injunctive relief.

The third aspect of this case which is the subject of injunctive relief is the fact that plaintiff's name is on a

[fol. 138] list, and the reason why we attempted to call Mr. Fixa is to prove that there is a list.

We will also introduce a card which is the card form which I read to you here in Paragraph IV of our complaint which had been filled out by the Postmaster General's Office and mailed to the various post offices. In other words, the Government has filled out the card which Heilberg had refused himself to fill out; and if that is not an indication of the fact that he didn't desire this in this form, then I don't know what is.

So that we are prepared to prove that the list exists; that his name is on the list, and we will be prepared to show not only that Mr. Heilberg has been deterred himself, but it should be clear from the face of the complaint that he was forced to make a choice between receiving this particular mail before getting his name on the list, and he chose not to receive the mail and he was deterred in the clearest form possible.

We will show not only that he was deterred, not only deterred in that sense, but he was deterred by what we will seek to prove as very real fears in the context of America today: that being listed in this category casts unfavorable light to the extent people are deterred from receiving that which they would otherwise receive.

Let me be very clear about this point. The free speech [fol. 139] issue here isn't whether or not you would be willing to be so classified. The question, the factual question, is whether or not people are in fact deterred; for whatever reason, rational or irrational, if they are in fact deterred and interfered with because of their fears, whether groundless or not, if that is a fact, then there has been a direct and immediate interference with freedom of speech, to wit: they have not read that which they otherwise would read. Without more, that is the real heart of the free speech issue when we come to it, and that is a matter, when we reach the merits, that we will be prepared to prove in a number of different ways, by three specific ways, to wit: by the testimony of Mr. Heilberg, by the testimony of others and by analogy to the case materials which will reflect what we consider to be analogous situations with respect to deterrents.

May I at this point merely point out one case which the plaintiff has cited in his memorandum, the Talley case, to show you, and which we believe to be on this point—

Judge Zirpoli: The Talley case is very clear that if there had been some indication in the legislative history the case might have gone entirely the other way.

Mr. Blease: No, there was legislative history—

Judge Zirpoli: The Government hadn't shown any justification for putting on the name, and that was to avoid fraud. Anything of that character would have determined [fol. 140] the Talley case the other way, and all the judges were entirely agreed on that, the majority and dissenting opinions.

Mr. Blease: I think the point here, Your Honor, is that the Government does have the power to reach certain kinds of ills, to wit, fraud, or many kinds of categories, obscenity, for example. However—and there are two prongs to this particular case: A, if they use a method which is overbroad with respect to that material; that is, if they, in spite of the fact, do not use that sensitivity so that people are not deterred from reading that which in fact is not communist propaganda in this case, then we have a case. Clearly in the Talley case the method was overbroad even conceding that they wanted to produce fraud. The method which they used to reach fraud was with a mass technique of the type that we have involved here.

May I direct your attention at this point to the statement of Mr. Tyler Abell which has been attached to our memorandum in opposition to the motion to dismiss, to demonstrate two kinds of things: the way in which the statute operates and should operate and be correctly understood, and some statistical information which I think is revealing about deterrents.

There has been a confusion—and I want to try and clear this up because it has not been particularly clarified heretofore—May I go over the steps by which this statute [fol. 141] is put into operation?

To begin with, all mail which is coming from the specified communist countries is sent to the screening centers. At the screening centers the exempt mail—and exempt mail is that mail—

Judge Zirpoli: Let's stick to the first step. Do you find



that objectionable, that all mail coming from communist countries should be sent through a particular station? Is that objectionable?

Mr. Blease: To this extent: to the extent that it imposes a delay which would not otherwise occur.

Judge Zirpoli: Don't you think we ought to know what the communist Russians or someone else is doing with relation to our own country? Don't you think we ought to have some knowledge of the nature and extent of their propaganda?

Mr. Blease: We are—Yes. The answer is "yes."

Judge Zirpoli: And we ought to have some knowledge of the nature of it, too.

Mr. Blease: That's right, and we—

Judge Zirpoli: All right, you would have no objection to it going to a particular center?

Mr. Blease: No.

Judge Zirpoli: No.

Mr. Blease: We would have no objection but at this point I don't think it is involved at all—

[fol. 142] Judge Zirpoli: I am trying to follow you step by step.

Mr. Blease: We would object to the procedures which have been utilized.

Judge Zirpoli: Do you object to the mail being opened to determine what the nature of it is?

Mr. Blease: We object to the mail being delayed, opened, searched and classified.

Judge Zirpoli: First you have to open it. Do you object to it being opened?

Mr. Blease: Yes.

Judge Zirpoli: (Continuing)—to ascertain whether there is a plot to bring about a national feeling of rebellion to overthrow the government by force and violence? We know what the communist form of propaganda is, world revolution and the like. Do you object to Customs reviewing it, opening it to ascertain these questions?

Mr. Blease: Your Honor, there are other statutes which are not at issue here. There are other statutes, for example 19 U.S.C. 1305, which permits the detention of matter which is believed to be matter inciting violence or obscenity or things like that. We are not—



Judge Zirpoli: This could be an aid thereof, could it not?

Mr. Blease: I want to distinguish those cases because they are not analogous and we don't want to argue those [fol. 143] cases. We can concede arguendo that those are proper methods at this point.

Judge Zirpoli: Do you concede, then, it is proper for Customs to open this mail?

Mr. Blease: We will concede the general point that under some conditions it is proper to open the mail, but we are not conceding that under all conditions it is proper to open mail. Specifically, we are not conceding that it is proper to open mail under these specific conditions. It is clear under the cases that the mail may be opened under certain circumstances, and there are other statutes that deal with this. And I might add with respect to one of the expressions of the judges here that there are specific federal regulations that permit any citizen who does not want to receive communist political propaganda to notify the Postal Department and then leave that job up to them. That is already on the statute books. We are not contesting that. Anybody who is annoyed at what he is receiving can delegate that authority to the Postal Department to take care of it for him. That is already in the federal regulations. This is supposedly to achieve the same result which is already available to those persons who, when they in their own independent judgment of how the classification is going on, are content to leave it up to the Postal Department to do it.

Judge Zirpoli: How am I to know that I am about to [fol. 144] receive some specific propaganda? How am I to know?

Mr. Blease: I suspect you could, without receiving anything—

Judge Zirpoli: How am I to know? Do I have to wait until it arrives and then my neighbors and everyone sees that I have received a package?

Mr. Blease: No. If you are overly concerned about this, Your Honor, I suspect before you received anything you could send a letter or a note down to the Post Office saying, "Will you please detain all matter of this kind?" That is taken care of and nobody has seen anything.

On that point, may I say that the card which is sent out—

this mail comes in closed packages; the card which is sent out and which is delivered is a postcard and is in the guy's mail and it says, "We have waiting for you mail which we have determined to be communist propaganda which has been addressed to you."

Judge Bone: Mr. Blease, does this package in which this mail is encased and delivered have anything on the wrapper indicating its contents?

Mr. Blease: We have only seen a few of these pieces, Your Honor. The pieces we have seen have stamped on them the country and in some cases the magazine which is being sent out. But that is not required. I suspect there is some of this mail which, apart from the addressee, reveals nothing.

[fol. 145] Judge Bone: Is there anything there that would reflect on the man's character, his morals or anything else?

Mr. Blease: Depending on how you view that, there may or may not be.

Judge Bone: The moment he takes it into his house, it is within the cloister of his home and he does what he pleases. If he is like me, he would throw it in the trash can.

Mr. Blease: That's right.

Judge Bone: I wouldn't even allow the Postmaster to annoy me by asking me to write him a card. It is none of his damn business whether I like it or not. I put all that kind of mail in the trash can.

Mr. Blease: That is precisely our point.

Judge Bone: If this comes to him in a package that hasn't anything on the outside, how is he besmirched among his neighbors?

Mr. Blease: He may not be in fact. He may be more besmirched—

Judge Bone: His feelings are hurt, is that the idea?

Mr. Blease: Well—

Judge Bone: If I lived next door to this man and he had been getting this several times and I didn't know what was in it and cared even less, how would the effect on my mind be to his disadvantage? Are you conjuring up devils and demons and going back to witchcraft? What kind of argument is that?

[fol. 146] Mr. Blease: I am glad you made the point—

Judge Bone: Who would give a hoot what kind of mail he got unless it had a stamp on it that it was communist mail? That might mean something.

Mr. Blease: Apart from this program, Your Honor, they may never know he has been receiving it; until it arrives in the mail.

Judge Bone: If anybody sees it, he is responsible for that, isn't he?

Mr. Blease: Then he can throw it in the waste basket or do whatever he wants to with it.

Judge Bone: No, no. If anybody knows that he got this mail from some Commie nation, it is because he showed it to them?

Mr. Blease: That's right.

Judge Bone: So by his own act he has laid the foundation for you coming into court and asking for an injunction.

Mr. Blease: No, no.

Judge Bone: You say the package comes enclosed in some sort of wrapper or envelope.

Mr. Blease: What I was comparing, Your Honor, was the operation of the statute against the non-operation of the statute. If the statute were not in existence, all that would happen—

Judge Bone: It all gets back to this so-called list?

Mr. Blease: Yes, but what happens—

[fol. 147] Judge Bone: How does it part company with the basic idea that the thing that this man is talking about and worrying about is this alleged list which is probably a box where they have this mail so if they want to check up, they can find out whether this fellow has ever written them about mail? He may have written them before.

Mr. Blease: What we are saying is that what this statute has done is to bring into existence a list which otherwise would not exist; the mail would be received at his home; if he didn't like it, he could throw it in the waste basket. If he didn't want the mail, he could read the federal regulations and tell them he didn't want any more and that would be the end of it. The neighbors might never even know.

Now, under this program, he receives a neat little card saying, "You have received communist political propa-

ganda" on the face of it. It is open to the postman and the like, and there it is. So it seems to me that the operation of this program is what besmirches him, and that seems to me to be the subject of injunctive relief.

Judge Bone: They give him a card form—

Mr. Blease: Yes.

Judge Bone: Is there any compulsion on him to drop it into the mail or put it in an envelope and mail it to Mr. Fixa, the Postmaster?

Mr. Blease: No. As a matter of fact, if he doesn't answer [fol. 148] it—

Judge Bone: So if he drops it in the mail, he willfully and deliberately injures himself and then lays that as a predicate for suit.

Mr. Blease: If he says he wants it—

Judge Bone: What?

Mr. Blease: If he says he wants it, then he has got himself on the list.

Judge Bone: I know, but he doesn't have to send a postcard through the mail; he can put it in an envelope.

Mr. Blease: Yes, he could, but the mail goes both ways.

Judge Bone: Like a man sticking his hand into a chopping machine and then crying to high heaven that someone has mangled his hand.

Mr. Blease: The mail goes both ways, Your Honor. It is not in an envelope when it comes to him.

Judge Bone: Somebody has to look at some mail in the post office.

Mr. Blease: However, and what we are contending here is not public opprobrium but it is also what could happen to him by way of reprisal within the government itself.

Judge Bone: Is there any publication of this list to the general public?

Mr. Blease: We will be prepared to prove that in the past there has been publication of parts of it, and we will [fol. 149] be prepared to attempt to prove that there is a reasonable likelihood that it will be in the future.

Judge Bone: Is there any publication of such a list of these people? I have lived in this city 20 years and I am not aware of anything. This is the first time I have ever heard of anything like that. Maybe my rights are infringed by Mr. Fixa not sending me notices that he has a list

down there that I ought to look at. Maybe I ought to criticize Mr. Fixa and write the Postmaster General and have him fired for robbing me of the constitutional right to know exactly what goes on all the time in his office. Where is this sort of censorship to continue—the censorship of Mr. Bone, a private citizen, over the Postmaster?

Judge Zirpoli: Have you got anything over and beyond the statement of Mr. Tyler Abell? Do you have anything that could conceivably be stronger than that as far as the list is concerned or the use thereof. Do you, actually?

Mr. Blease: We have referred in the memorandum, Your Honor, to certain publications specifically. There are others at this time which we did not put in because it was our understanding that the subject of this hearing was the question of mootness. When we get to the merits, of course we will introduce these other publications and we will attempt to introduce actual testimony, perhaps the testimony of others who have rejected the postcard and attempt to elicit the testimony of others to show that [fol. 150] the fact is affirmatively. When we show these kind of facts, it seems to me it brings us clearly within the purview of the First Amendment and the subject of injunctive relief.

Judge Bone: Mr. Blease, is there anything in this case of substance except your client's contention that presently in the Postmaster's office is some correspondence with the Postmaster and beyond that, so far as physical facts go, it is the assumption of this man that somehow that is going to be broadcast to the public to his great injury; or is it because his feelings are outraged? It is strange that nothing has ever been said by the newspapers of any list of any kind here.

Of course, I assume you know—if you don't, I worked around the prosecutor's office—there is a lot of information that gets into a Police Department and they make a note of it on their records so that if something goes wrong they have a MO of this man's criminal propensities. I suppose you think the courts ought to stop that.

Mr. Blease: That is not at issue here.

Judge Bone: If he has committed another crime, is he entitled to an injunction to have that blotted out of the police records?



Mr. Blease: Again we are not contending that all those things are bad or that all lists are bad. We are contending [fol. 151] that this list right here—

Judge Bone: Where is this kind of court interference with operations of this kind to end? It would swing wide all these doors and we would be regulating everything instead of the President and the Executive Department regulating a few things left in the country.

Mr. Blease: There have been many cases dealing with the right of anonymity, Your Honor, and the Supreme Court has ruled—

Judge Bone: I have been reading them for 54 years and I am still confused by the new array of charges being made continually. They astonish me with all this experience back of me in legislative bodies, state and federal.

Mr. Blease: The point is that the court sometimes has said you must disclose and sometimes that you must not disclose. If you are making the camel's nose argument—

Judge Bone: If we had a little more security in this country, there wouldn't be so many murders, there wouldn't be so much outrage being perpetrated by fellows. I have an old-fashioned notion because armies of boys are being carried on battle fields to try to make the country a little safer for decent people. Perhaps you don't share that view but I have a very strong feeling about it. I am talking about real human liberties, not some fellow's feelings.

Mr. Blease: May I—

[fol. 152] Judge Bone: About a thing that hasn't been publicized—I never heard of this, and I don't think anybody in this court ever heard of it who is not perhaps immediately associated with the post office. And when a man deliberately opens a package and tells his neighbors deliberately that he has gotten this kind of package from the Post Office Department, he wants some vindication of his right to object to that?

Mr. Blease: That is not the point.

Judge Bone: I know it isn't the point with you. It is the point with me. That is what I want you to make clear to me. And that is what you will probably have to make clear to the Supreme Court of the United States, if you get there.



Mr. Blease: May I just complete the way in which this statute operates? When this mail is sent to the screening points, that which is exempt mail, which is contained in Subsection (c) of Section 4008, is sent on. It is not opened or otherwise looked at, and to be in that category it has to be addressed to a governmental agency.

Judge Bone: Do you want a declaratory judgment from us abolishing that screening process?

Mr. Blease: Yes.

Judge Bone: You do?

Mr. Blease: Yes.

Judge Bone: Are there any other departments where it will reach in in the area of this injunctive order? We might [fol. 153] as well stir up the animals right while we are at it.

Mr. Blease: After the exempt mail is sent on, that matter which is left over is then detained at that point—as a matter of fact, Point No. 5 in Mr. Abell's statement says:

“Customs examines the detained mail to determine what is and what is not propaganda.”

All of that mail, then, is subject to opening, examination, reading and classification. Then that which is non-propaganda—Mind you, it has already been processed, detained, opened, et cetera—is sent on and then—

Judge Zirpoli: Do you find that objectionable? Do you really find that objectionable?

Mr. Blease: Yes.

Judge Zirpoli: Assuming there are millions and millions—eight hundred million, nine hundred million pieces of mail—that come through and they have this privilege of sending it other than first-class, and they are coming from a communist country, a country with whom we are fighting throughout the world on the matter of ideology, and they are to be spread about this country and we are to take care of the expense of distributing this less than first-class mail and we don't indulge in any process of this character, and we proceed to distribute it indiscriminately. What happens? Instead of a billion, you will see within six months or a year you have two billion pieces, and the Government continues to incur the expense of

[fol. 154] spreading this type of propaganda. Isn't that the consequence of it all?

Mr. Blease: It may very well be that the government has the power to prohibit all such mail from communist countries, but the power to prohibit does not include the power to condition by unconstitutional provisions, if in fact you let it in. And if you will refer to the restriction in Mr. Abell's statement—

Judge Zirpoli: The power to prohibit also includes the lesser power, does it not?

Judge Wollenberg: I should think so.

Mr. Blease: May I suggest that this program would be far more costly than letting the mail go through according to the figures here. Most all of the mail is delivered anyway. It is either in exempt categories or is subscribed to or otherwise the people want it. We then have a postcard, which costs an additional amount of money, and that has to be marked and you have to mail the piece on, so there is two pieces there. And I think it is the subject of testimony furthermore, Your Honor, if the Government wants to rely on the cost of this program, we will be prepared to prove that this is more costly than—

Judge Zirpoli: It is a question that lies with Congress. That may be the basis of it. Whether it is right or wrong is not for us to say.

Mr. Blease: If this comes to the question—and we are [fol. 155] not saying that it will at this point—that what you are doing is balancing the Government's purpose against what has happened to our client, then this question will become entirely relevant because then the question of why they want to do it will be truthfully answered. If they want to do it to save money and create employment, it seems to me there is no necessity for doing it. If there is no necessity for the program, then I think the Court would say—

Judge Zirpoli: You are right; it is not for us to decide on this program. I don't agree with you on the first premise, so proceed.

Mr. Blease: To finish off the way in which this occurs, if the mail is determined to be communist political propaganda and has not already been dispatched and they have no indication of whether the person has subscribed or

otherwise wants it, then they mail the notice to him. I must point out at this point there are two kinds of detention involved here. There is the first detention when it goes to screening and the like, and there is the second detention when they hold it for the purpose of mailing the card out. With respect to our client, only the second detention has been obviated, not the first detention, and we are still claiming that the mail is being detained for the purpose of search and seizure and still brings us before this court for injunctive relief. The second detention has been obviated [fol. 156] by the fact that they are now sending the mail through, but that would be merely a source of additional aggravation if they were not doing that.

One last point on these figures is to show that we have what in fact on the face of this case is the apparently irrelevant figures, and the relevant figures from the Tyler Abell statement are those figures of the notices that were sent out and either returned saying "We don't want it," or not returned. And I have gone through the compilations here somewhat. Of those persons who have been sent notices—and as far as we know, this is the only category of people who know about the program, because the exempt mail goes on through. You never know about the program, because there is nothing to indicate on the mail itself that anything has happened to it—but of the people who are notified about the program, those people to whom notices have been sent, that only 34% of those people indicated that they wanted that piece or all the pieces; that is, two-thirds of the people to whom notices were sent in one way or another manifested the fact that at that level they didn't want it. Some of those people may have a variety of reasons for which they don't want it, but all we can suggest here is that it seems obvious to us that some of those people were frightened by the possibility that they would be identified as having received communist political propaganda; and if that is the case, if so much as one person has been deterred—and we have alleged that already and we will prove that by Mr. Heil- [fol. 157] berg—then we have an interference with freedom of speech, and it seems to me we have a justiciable issue before the court relating to our client, and if you want to go on further, we can prove that it relates to other people

as well. But in the first instance we are attempting to demonstrate that our client has been deterred and that others on the face of it have been deterred as well, and that it seems to me to make out at least a sufficient case to remove us from the mootness point. So there is relief which is still outstanding with respect to this, and then may I point out that there are two other subjects of relief here as well; that is, he has been injured because he has been placed in a class, and if you are in certain classes, there can be an injury by virtue of being placed in the class.

Judge Bone: I think we will stand in recess until two o'clock, and I want to suggest to counsel, if they have witnesses they propose to use, to have them here at two o'clock.

(Recess to 2:00 o'clock p.m. this date.)

[fol. 158]

## AFTERNOON SESSION

Thursday, January 2, 1964

2:00 o'clock p.m.

Judge Wollenberg: Go right ahead.

Mr. Blease: May it please the Court, perhaps two minutes would finish what—

Judge Wollenberg: Very good.

Mr. Blease: —I have to offer. I would like to make one correction. I was in error this morning in stating that the notices were in the form of postcards when they were sent to the addressee. They were included in a letter, I am now informed, and the letter itself is stamped that it was mailed from the Foreign Propaganda Unit, and that's the only surface indication of the nature of that which is contained in this notice.

Judge Bone: I have one little request to make of you gentlemen. If there is some text in this volume that our brother Collett handed us, you evidently know where it is in this huge volume, could you give us the pages which we should examine—the text of this matter? I don't like to trouble you gentlemen, but I would like to at least read it and see what this argument is about.

Mr. Blease: We would be happy to submit—

Judge Bone: Would you do so? Just a little slip of paper, informally, showing on what page we will find the [fol. 159] thing that probably has some germaneness here.

Mr. Blease: We have indicated a couple of references in our memoranda to it. Beyond that, we would have to—

Judge Bone: Well, could we find it in that?

Mr. Blease: Not all of the references, Your Honor.

Judge Bone: Just a little piece of paper showing the pages on it, that's all.

Mr. Collett: If the Court please, it might help you to this extent: The statement of Congressman Cunningham with regard to—

Judge Wollenberg: Well, why don't you give us a memorandum on this also?

Judge Bone: Just a little informal piece of paper with the pages, so we can read them.

Mr. Blease: We would be very happy.

Judge Bone: We don't need another brief on that.

Judge Wollenberg: No.



Mr. Blease: Secondly, I don't think I made it clear that this statute applies to all classes of mail, with one exception, and that class is the class of sealed letters, that is the only specific exemption in the statute, are sealed letters, so it includes all mail in classes two, three, and four, or whatever classes there may be, and it includes first-class mail other than sealed letters. There is a definition which we have included in our memorandum of first-class mail, [fol. 160] which you will find includes sealed matter of whatever kind other than the letters covered here.

Judge Bone: That is regardless of its origin?

Mr. Blease: Regardless of its origin. There is a definition of what first-class mail constitutes, and this statute does not exempt all first-class mail, but merely that portion of first-class mail which is in the form of sealed letters. If you had a sealed envelope, for example, which is obviously not a letter, and some of the items appear to be in that form, it would be subject to first-class postage under that definition and would be sealed matter and first-class postage, as we understand the definition.

Now, it may very well be that some of those items which we have come within the purview of the statute.

Now, there was one other point with respect to the injuries involved here, and that deals with the classification argument that we have made. We have argued, among other things, that this is a violation of the equal protection notion which is contained in the due process of law, the Fifth Amendment; that is, by virtue of the fact that Mr. Heilberg and others in his class have been separated from those who are —

Judge Zirpoli: Are you serious on that argument? In other words, you're protecting, presumably, your civil rights. Do you quarrel with the fact, does he quarrel with the fact they did exempt, say, the universities?

[fol. 161] Mr. Blease: We are not quarreling with the fact. We are saying that the fact that they have made these classifications is not a reasonable classification, which is subject to attack. That is, there would be no basis for having a distinction unless the distinction meant something, and what it obviously means in this case is that our client, among others, is less able to understand for himself



the nature of communist political propaganda than those who are in the exempt category.

Judge Zirpoli: All they are saying is that these institutions have more right and need for it than individuals, as individuals. That's what they are saying.

Mr. Blease: But the question of need in a democratic society seems to me to be one of equality, no matter who is involved. We all need to be informed in order to participate.

Judge Zirpoli: I know, but is the government going to subsidize everybody? This is a mail-matter question, this is a question of classification of mail and the manner in which it will be handled. This is the statute under which it was enacted.

Mr. Blease: On that point, Your Honor, although classifications are permitted, classifications which turn upon unconstitutional conditions are not permitted; to wit, you cannot have a classification which makes the unreasonable assumption that our client is less able to make this decision than others.

Judge Bone: Mr. Blease, is there anything in the regulations of the International Postal Union, with head-[fol. 162] quarters at Berne, Switzerland, that would bear on this? You know, every nation in the world belongs to the International Postal Union, unless it would be the Soviet system and the Chinese Communist system.

I remember talking to some of the spokesmen for the University of San Francisco and they wanted to get into this communist problem, and I said how are you going to get into it unless you know what it is? You can't tilt lances at windmills, you are not another Don Quixote in the educational field, why don't you get all the communist literature you can? If you are going to fight something, you have to fight with an understanding mind. Well, they did put in a course there in communism, and I guess they probably get all this questionable information of some sort, they must get all this stuff, and it's in aid of institutions who are trying to understand what the international communist movement means.

Mr. Blease: Well—

Judge Bone: Are they in a position to do a lot of harm to individuals? Think of what it means to their student

body, who is getting the same literature that your client is getting.

Mr. Blease: Well, our point—

Judge Bone: Do you think they are perverting the minds of young Americans in universities by teaching them what appears in this literature?

Mr. Blease: I should hope not; I teach in one, Your [fol. 163] Honor.

Judge Bone: I'm sure that university would be delighted to get oceans of the stuff to see what's in it. As a matter of fact, I would be inordinately curious myself to know what these gentlemen are saying.

Mr. Blease: Well, I think that is our fundamental position, Your Honor. I think everybody ought to have access, without any deterrent.

Judge Bone: Yes, a few individuals, just a comparative handful of individuals, might find their minds somewhat perverted, but here, the great universities, with courses on communism, they're putting into the minds of an enormous student body some idea of what the communist movement of the world is.

Mr. Blease: I think the assumption that certain people are more likely to be perverted by reading is an impermissible constitutional assumption, Your Honor. What the First Amendment means to me, Your Honor, is that everybody is on an equal footing with respect to this.

Judge Bone: Well, would you put the universities on an equal footing with Joe Doakes?

Mr. Blease: With respect to the receipt of this matter, yes; with respect to this statute, yes.

Now, lastly, on the question of deterrents, I would merely refer you to the statement by Senator Clark, who argued against this bill when it reached the floor of the [fol. 164] Senate, and on the question of deterrents, what he said—this is just a very short paragraph: (Apparently quoting.)

“While the Committee proposal would permit persons who have received notices from the post office that communist political propaganda is being held for them to file requests for such matter and obtain it, clearly a stigma might be attached to those who attempted to exercise their rights in this regard. This would be especially apt to

happen in small communities, where such actions are almost surely to become widely known, the information might well find its way to the FBI files."

So, we would suggest, if Senator Clark, an esteemed member of our Congress, could reasonably find that there is a stigma, that we at least have made out a case for overcoming the question at issue here, namely, the justiciability of this matter with respect to the very real possibility of deterrents.

Now lastly, I would say that I think there would be no question of mootness, and really what we are dealing with here, the memorandum attempts to point out, are questions of mootness, rightness, standing and injury, and we tried to separate those in our analysis from what are all assumed by counsel for the government under the notion of mootness, there are really several questions, that but for the action of the government, and we contend an action which is in violation of the very statute which we are challenging, [fol. 165] there would be no question about the mootness of this case because we would be seeking to obtain mail which they have in their possession.

Now, as to rightness, it has been difficult for us to conceive of any other way in which this statute can be challenged. The source of the mail, I think, would lack standing, and frequently communist governments don't have standing; and if they did have standing, there would be some question of First Amendment rights in this country. The only people who are likely to not have any standing to raise this issue are the recipients, and the statute, unfortunately, is directed against the recipients. If it were directed against the governments, it might be an entirely different matter.

Judge Bone: Mr. Blease, do you know of any segment of the American society, of any prominence, that isn't stigmatized by all sorts of criticism? It starts with the Supreme Court of the United States, who a mighty large segment of the population, how large I don't have any idea, want to have impeached, starting with the Chief Justice. If you read the history of your country, sir, you know the things said about Abraham Lincoln during the war emitted atomic sparks a yard long. Do you know of any way of curbing this? Have you ever served in the legis-

lature we call the Congress of the United States? Can you imagine how much stigmatizing goes on in the mail that gets there? Did you ever hear of a congressman seeking an injunction against some fellow writing him nasty letters? [fol. 166] There wouldn't be enough judges in Christendom to try the cases, if they could all get into court.

Mr. Blease: I can only suggest we can deal with one stigma which is specifically at issue here, namely, this statute.

Judge Bone: I know, you're picking out one fellow who probably I never even knew he existed, and you make a big case out of it.

Mr. Blease: A federal case.

Judge Bone: A federal case, yes. And now here is the President of the United States stigmatized, the Chief Justice is stigmatized in language that sizzles, and he has no defense. Where do you think Justice Warren would get going into court and trying to stop the stigmatizing of the Supreme Court and the impugning of its motives?

Mr. Blease: It is one thing for one——

Judge Bone: Here is the chief court in the United States——

Mr. Blease: The stigmatizing here is being done by the government and that's the purpose of the First Amendment.

Judge Bone: Well, what are you going to do, indict the whole American people and undertake that thing which even Edmund Burke said was an impossibility, the indicting of the whole nation of people?

Mr. Blease: Not at all, we're merely indicting one [fol. 167] small statute.

Judge Bone: Justice Harlan said it is perfectly proper to criticize the courts, including the Supreme Court of the United States, and criticizing it to your heart's content.

Mr. Blease: Of course, it would be another thing if they started censoring mail going to the courts, and I think that would be a parallel issue.

Judge Bone: All right. Now, stigmatizing a senator or congressman may endanger his political life, destroy his whole public career. Do you think that's to be compared to what's likely to happen to your client?

Mr. Blease: It might be more, for all I know, Your

Honor, but there is a difference. The government is participating in one, and in the other it's not, and that is the constitutional difference, that is the function of the First Amendment, to keep the government from——

Judge Bone: Well, the constitutional history of the country, most of us have tried to understand, maybe we don't do a very good job of it, but we certainly have had our noses in books long enough to know something about the constitutional history of this country, arising largely from English sources. A lot of it is clearly confusing to many people. Lawyers spoke with bated breath about the Magna Carta for six centuries. It didn't amount to much to anybody in England. It spoke of free men being entitled [fol. 168] to a jury trial. You go back in English history and find out how many jury trials occurred with the little man over there, the little fellow who had no one to speak for him. Serfdom, virtually. The process of living was clamped down on him until he was like a Hungarian helot in the worst stage of Hungarian tyranny.

Mr. Blease: One of the most famous cases in constitutional history is that——

Judge Bone: That has always puzzled me, why these encomiums of praise for Magna Carta, when even the English didn't pay much attention to it for centuries? They had Star Chambers, if you know anything about your English history, and I think I do, and I imagine you must. If you're interested in constitutional history, you can't overlook what happened in England, Merry Old England.

Mr. Blease: I think this case is very similar to that which happened in Merry Old England, *Henrick versus Carrington*, which is the classic case that relied upon *Boyd*, the first great Fourth Amendment case, dealt with a search for seditious libel, and here we have a search for that for which the government claims is valueless, it seems to me a proper assumption, namely, communist political propaganda, the distinction being in one case we have a house, and in this case we have a guy's mail, but it seems to me that this case and our challenge is directly in line with *Henrick versus Carrington*, *Boyd versus The United States*, and carried down to the *Marcus* case, which [fol. 169] embodies these kinds of notions.

Judge Wollenberg: Have you more before you call the witnesses?



Mr. Blease: No.

Judge Wollenberg: All right.

Mr. Krause: We would like to call our witnesses, then, Your Honor.

Judge Bone: All right.

Mr. Krause: Call Mr. Fixa,

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JOHN FIXA, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Mr. Collett: If the Court please, for the record, since it might be a partial reply to Mr. Blease, we are still concerned with the Section 4008 of Title 39, and Section 4008 contains nothing about any lists of any kind, contains nothing about procedure. We have not before us in this complaint any challenge to the illegality of procedures, the unconstitutionality of procedures; the only thing that is before us is Section 4008.

Mr. Krause: May I suggest that Mr. Collett is interfering in the middle of my presentation to present arguments which he will have the proper place to present at the end of my——

Judge Zirpoli: I assume Mr. Collett is objecting with the further proceeding of this witness at all.

[fol. 170] Mr. Krause: He hasn't stated any objection, Your Honor.

Judge Zirpoli: Is that your objection?

Mr. Collett: Well, I didn't get a chance to really finish. Mr. Krause is in a hurry to move forward. Therefore, if I can proceed now, having in mind the remarks of the Court as well as counsel this morning, that the purpose for which Mr. Fixa has been called is with regard to a list, I am going to interpose an objection to any pursuit of testimony upon that basis at this time on those grounds.

Judge Bone: The objection will be overruled.

Mr. Krause: Thank you.

The Clerk: Will you state your appearance and your occupation for the record, please?

The Witness: My name is John Fixa. I am postmaster of the San Francisco Post Office.



## Direct examination.

By Mr. Krause:

Q. Mr. Fixa, as postmaster of the San Francisco Post Office, do you take any part in the enforcement of Section 4008, commonly known as the Cunningham Amendment, dealing with communist political propaganda?

A. I am responsible for its administration, yes.

Q. In what area, Mr. Fixa?

A. Well, just to see that the regulations of the Post Office Department are carried out with respect to this unit. [fol. 171] Q. Oh, excuse me, what geographical area?

A. Oh, just for San Francisco.

Q. Now, do you know a man named Mr. Tyler Abell?

A. I know of him, yes, sir.

Q. I want to show you something attached to the Plaintiff's Points and Authorities as Exhibit No. 3 which is titled, Statement of Tyler Abell, Associate General Counsel of the Post Office Department, before the Postal Operations Subcommittee of the House Post Office and Civil Service Committee, June 19, 1963," and ask you whether you have seen a statement like this before?

Judge Wollenberg: Is this for the purpose of laying a foundation of some sort?

Mr. Krause: Yes, Your Honor.

Judge Wollenberg: Is there an objection?

Mr. Collett: He has just asked him if he has seen the statement. I am going to object the minute he asks the next question, this is a matter which is attached—

Judge Bone: Well, may we look at it for a moment?

Mr. Collett: Yes, Your Honor.

Judge Bone: I don't think I have that part of the record.

Judge Wollenberg: What I meant, Mr. Collett, what I was inquiring about was this: Do you raise any issue as to the fact of authenticity of the exhibit? In other words, [fol. 172] is this in fact a statement of Mr. Abell?

Mr. Collett: As far as I know, it is, Your Honor.

Mr. Krause: Then, with that stipulation, if it is a stipulation, I will withdraw the question.

Judge Wollenberg: That's what I thought you were wondering about. Is that agreeable, Mr. Collett?

Mr. Collett: That's all right.

Judge Wollenberg: All right, you're agreed.

Mr. Krause: Q. Now, Mr. Fixa, in the course of your enforcement and supervision of Section 4008's operation, is a list of persons who have indicated a desire to receive some or all communist political propaganda kept by any person under your jurisdiction?

Mr. Collett: I am going to interpose the same objection as at the beginning, if the Court please, pertaining to any list. There is nothing presented in this complaint which challenges the constitutionality or unconstitutionality of any regulation pertaining to any list, there is no regulation of any kind which is cited as being improper, invalid of any kind, he is just inquiring with regard to a list.

Judge Bone: We will have to decide on its relevance later; at the time being, at least, your objection is overruled. Is this intended to be a comment on mail coming into the country from foreign sources?

Mr. Krause: The intent—oh, Tyler Abell's statement? [fol. 173] Yes, it is, it's an indication of the way the program operates and its administrative operation, Your Honor.

Judge Bone: Well, does this deal with anything except foreign mail, mail of foreign origin?

Mr. Krause: The House Post Office Committee held hearings on precisely this statute and Mr. Abell was asked to explain the operation of the statute and this is the statement he made to explain the operation of the statute after it was already in operation.

Mr. Krause: Q. Do you remember the question, Mr. Fixa?

A. Yes, I do. As such, there is no list, we have no list; we have a card file.

Q. Would you describe that card file, please?

A. Well, it's a—roughly, it's a card, roughly about three by five, that is sent to—three by five inches—sent to each patron to whom a piece of mail is being sent, asking whether or not he wants this card, and he indicates his desires on this card and returns it to us and it is filed in this Propaganda Unit and it is maintained in a file.

Q. Now, is this card you spoke of commonly known as P.O.D. Form 2153-X?

Mr. Collett: If the Court please, may it be understood that the same objection is running to this entire line of questioning as to its relevancy and so on, and as to the complaint and the allegations of the complaint?

[fol. 174] Judge Bone: Well, I think we understand the basis of your objection, and it will be overruled for the moment.

Mr. Collett: Well, I want the record to show that the objection is running to each one of these questions, without my repeating them.

Judge Bone: That's right, that may be understood.

A: Yes, 2153-X is the form.

Mr. Krause:

Q. Should the addressee of this card, 2153-X, check the place on that card stating "Deliver this publication" and then return that card to the Post Office, would you describe what is done with that card when it is received?

A. That card is filed in alphabetical order and used as a reference for not only the current publication, but publications, that same publication that may be sent out in other issues.

Q. Is it filed in the same place, kept together with similar cards from other addressees indicating a desire to receive this mail?

A. Would you mind repeating that?

Q. Is the card, 2153-X, filed in the same place, in the same cabinet or box, with the cards of other persons who have similarly expressed a desire to receive communist political propaganda?

A. Yes, sir, they are all filed in alphabetical order.

Q. Where is that file kept?

A. It's in the Foreign Propaganda Unit.

[fol. 175] Q. And are there post office employees who have access to that list?

A. Both post office and custom employees. It's a joint operation.

Q. Approximately how many people work in that unit in San Francisco?

A. Oh, I would say, roughly, probably six or seven.

Q. Now, I would just—

Judge Zirpoli: I would like to ask a question. How long has that unit been in existence?

The Witness: I think it has been, Your Honor, about a year, as I recall, maybe a year and a half.

Judge Zirpoli: Was that unit created as a result of this act, or did it exist before the act?

The Witness: It did exist before the act, before this act, and it was discontinued. Then it was re-established as a result of this statute.

Judge Zirpoli: All right.

The Witness: I think it was established prior to that, not by statute, by some postal regulation.

Mr. Krause:

Q. Now, sir, do you happen to know why the unit was discontinued? Was it an executive order, do you recall that?

A. Insofar as I know, it was just a Post Office Department order. I have no knowledge beyond that.

[fol. 176] Q. Now, do you know whether the plaintiff in this case, Mr. Leif Heilberg, has a card contained in that file of cards of persons desiring to receive communist political propaganda?

A. I have no personal knowledge; I haven't seen it. I certainly suppose he has a card in there.

Q. Pardon me, I didn't get that.

A. I say, to my personal knowledge, I do not know, I haven't seen his card, but he was mailed one. If he returned it, it will certainly be in the files.

Q. Now, did you receive a subpoena to require you to appear today?

A. Yes, sir, I did.

Q. Do you have that subpoena with you?

A. I do.

Q. Does that subpoena require you to bring to this Court the list of persons desiring to receive communist political propaganda?

A. Yes, sir.

Mr. Collett: If the Court please, at this time I would like to call the Court's attention to 39 PFR 114.3, which is Post Office Regulation—

Judge Bone: I think, Mr. Collett, and my associates do,

that we are concerned here with whether this man's name appears in that bunch. We don't want a whole batch of material brought in here; I think it is unnecessary; not add [fol. 177] to the relevance of what is being presented. This is not a class action. This man says he is personally having his rights interfered with. Let's find out whether his card is in this bunch, a postcard, a letter, or whatever it may be.

Mr. Krause: I will withdraw the question, then.

Judge Bone: All right. The question is withdrawn.

Mr. Krause: I have no further questions.

Mr. Collett: No questions.

Judge Bone: You know, what puzzles me, it seems to me, if there is a vast amount of validity in an inquiry of this kind, the next step would be for courts to face the questions: Shall the M.O. files, the B.O.I. files, the Bureau of Information, Sacramento, the F.B.I. records, all be brought into court because somebody heard from someone that his name was in one of those files? Every man who has had some criminal affiliations probably would find his name in the F.B.I. files, or the Court; for the United States to say that those files must be destroyed, would be a pretty bald assertion of authority, as I view it, which is not to say that I might not be wrong, but I can project ahead and ask myself whether any defense whatever against criminality in this country of any form should be stricken from all records of law-enforcement authorities, is a prodigious step towards something, and I don't like to even think about it.

Judge Wollenberg: Have you some other witness?

Mr. Krause: Yes, we have Mr. Heilberg. We would like [fol. 178] to call Mr. Heilberg.

Mr. Collett: Maybe we can save some time. What is Mr. Heilberg going to testify to? Maybe we can have an offer to what he is going to testify to.

Mr. Krause: I have given that offer to the Court already.

Judge Zirpoli: I think Mr. Collett has stipulated to most of it.

Judge Wollenberg: There may be one or two things. Why not have Mr. Heilberg sworn, he is here, we are here —let's have the witness sworn and make the record.

LEIF HEILBERG, the plaintiff herein, took the stand, and affirmed and testified as follows:

The Clerk: State your name, your occupation and your address to the Court.

The Witness: Leif Heilberg, salesman.

The Clerk: Where do you live?

The Witness: 1801 Page Street.

Direct examination.

By Mr. Krause:

Q. Mr. Heilberg, you are the plaintiff in the action now pending before this Court, is that correct?

A. That's correct.

Q. Do you have any connection with any international [fol. 179] movement which would lead you to receive great volumes of foreign mail?

A. Yes.

Q. Would you describe that, please?

A. The Universal Esperanto Association.

Q. Do you in fact get large quantities of mail from foreign countries?

A. Oh, yes, practically every day.

Q. Does some of this mail come from countries normally thought of as communist countries?

A. Yes.

Q. Now, do you on occasion get mail from foreign countries, including communist countries, which is unsolicited?

A. Yes.

Q. Do you have any examples of that mail with you?

A. Yes, I have something right here which I received inside of the last couple of weeks—these two pieces.

Q. Would you identify those by the titles of what is inside?

Mr. Collett: If the Court please—

A. This one, I can't see, I don't know—

Mr. Collett: If the Court please, I don't know how far it is going to go, but it seems to me this is all irrelevant.

Judge Bone: Well, apparently he isn't going too far; he has only two envelopes.



[fol. 180] Judge Wollenberg: Let's see what they are.

Mr. Collett: Interpose an objection as to relevance and materiality.

Judge Bone: I would like to ask him about the Esperanto business, this synthetic language, just how much cultural development it has produced in him. I got interested in it once.

Mr. Krause: Well——

Judge Bone: Go ahead.

Mr. Krause:

Q. Would you describe the contents of those two envelopes that you have in your hands now?

A. Upon examination?

Q. Yes.

Judge Wollenberg: What's in the envelope?

The Witness: This is an Esperanto publication from Bulgaria. It is the organ of the Bulgarian Esperanto Association.

Judge Zirpoli: This doesn't purport to be communist propaganda, does it, or ever having been classified as such?

The Witness: This is——

Mr. Krause: We don't know, Your Honor.

The Witness: The second piece of literature is called "Bulgaria Today," or rather "Nuntempa Bulgario Esperanto" and this is mixed news about the Esperanto movement and a lot of propaganda about their progress [fol. 181] and so forth and so on. They always mix propaganda with facts in communist publications, it seems. That's the second piece.

Mr. Krause:

Q. Now, you testified you received both of these within the past few weeks, is that right?

A. Yes, couple of weeks.

Q. Is there a likelihood that you will receive in the future similar publications from communist countries?

A. Oh, yes.

Q. And in your opinion do these publications contain what would normally be thought of as propaganda?

Mr. Collett: Objection, if the Court please.

Judge Wollenberg: I think that may be entirely—  
excuse me, I say I think this may be entirely irrelevant.  
I mean, we are asking this man now for his conclusion as  
to what this matter contained and there is no foundation  
that anything—

(Colloquy between the Court out of the hearing of the  
Reporter.)

Judge Bone: We are not going to be bound by the con-  
clusions of any human being in this court room; we are  
going to draw our own conclusions.

Judge Wollenberg: But the point that I wanted to  
make—

Judge Bone: Whether or not it has any relevancy we  
will have to determine in our own judgment. I hope it  
isn't a brash judgment. There is a little more at stake here,  
maybe, than appears on the surface. I want to ask this  
[fol. 182] gentleman about the cultural aspects—

Judge Wollenberg: Yes, but let's—

Judge Bone: I'm interested in European culture that  
made that whole continent—

Judge Wollenberg: All right, let's finish the question,  
there is a question pending, and we will say we will over-  
rule the objection.

Judge Bone: All right.

Judge Zirpoli: All right.

Mr. Krause: May we hear the pending question?

The Witness: Will you repeat it, please?

(Record read by the Reporter.)

A. Definitely so.

Judge Zirpoli: What, in your opinion, would you deem  
communist propaganda, so we are getting your frame of  
mind on this?

The Witness: Well, running down the free societies,  
which they call capitalism, and making heroes out of their  
partisans, or hero workers, or whatever they call them,  
everything they do seems to be just the very best and  
everything over here they run down, and everything they  
can find bad about this country, and about the western  
society, they will run down in every possible way they can.

Judge Bone: Does that convince you that this is a pretty bad lot here in the country?

[fol. 183] The Witness: No.

Judge Bone: What are you, a German or a Bulgarian—

The Witness: I am Danish.

Judge Bone: Danish?

The Witness: Yes.

Judge Bone: And you find yourself mighty perturbed, or do you?

The Witness: No.

Judge Bone: Of this indictment of the American people?

The Witness: Oh, I do not—

Judge Bone: Why are you so disturbed by what some fellow in Bulgaria has to say about the people of the United States and the culture of this country?

The Witness: It does not disturb me, sir.

Judge Bone: It disturbs you. You think you are—

The Witness: It does not, sir.

Judge Bone: Are you appearing here in pro bono publico, to save the public from some hideous fate, or what is the idea that underlies your suit?

The Witness: As far as the suit is concerned, I wish to receive any and all mail—

Judge Bone: Oh, yes, but there are a hundred and eighty million people in the United States that may have all sorts of ideas about it.

Mr. Krause: He is only one, but I think he has—

[fol. 184] Judge Bone: Oh, yes.

Judge Wollenberg: Let's not argue now; go on to another question.

Judge Bone: We don't want to argue about it, this is not a debate, but this man's state of mind, why he is appearing, apparently, pro bono publico, or does he confine it only to his own emotional reaction?

Mr. Krause: I will get into that, Your Honor.

Judge Bone: You get into that. Let's find out why the Danish gentleman is so disturbed about something that comes from Bulgaria which he desires to have, and you can explain what part Esperanto plays in it while you're at it. It might delight the Supreme Court if this case ever got up there. Go ahead and enlighten us.

The Witness: All right. Being an Esperantist, I am interested in receiving anything that is printed in Esperanto, from wherever it comes and whatever the material might be. There are quite a few people who do not know about Esperanto yet and anything I could receive from whatever source would be a proof of the utility of Esperanto, whoever prints it.

Judge Bone: Did you ever write to anyone in public life here, including federal judges, about the desirability of improving their cultural outlook by studying Esperanto?

The Witness: Personally, I did not, because I am not yet a citizen.

[fol. 185] Judge Bone: Well, then, what is the importance of Esperanto to you? Is it confined wholly to your own contemplations of life's problems? Or, if you were in a religious mood and wanted to do something for the whole world, did you ever undertake to enlighten anybody else here publicly about Esperanto?

The Witness: Yes, I do.

Judge Bone: How many?

The Witness: Oh, quite a few people, as many people as—

Judge Bone: Oh, quite a few.

The Witness: Well, anybody whom I had the opportunity to tell about Esperanto.

Judge Bone: Well, you may have an opportunity now, because you projected yourself well into the public eye. The American press can be counted on to refer to your objections here, but I didn't know there was anybody in San Francisco, and I have been on the Court, I served for twenty years, that was so interested in Esperanto that he wanted to turn himself into a sort of a messenger, imparting knowledge of Esperanto to the people.

The Witness: Yes, several.

Judge Bone: —ever dawn on you that any of us on the Bench here might be interested in Esperanto?

The Witness: Well, there are several people in [fol. 186] San Francisco who are so-called delegates for the Universal Esperanto Association, the association which their sole purpose is to distribute knowledge of and use of Esperanto throughout the world. I am just one of the delegates. The main delegate has the chief responsibility.

**Judge Bone:** So your position is that you must defend the right of the Communist Party of Bulgaria to introduce into this Esperanto literature a lot of stuff that may be highly obnoxious to a lot of people?

**The Witness:** I do not agree with that statement. It is not a matter of induce a lot of people. Anybody can use any language, so print anything they want, and it is any individual person's right and liberty in the United States, according to the Constitution, to receive any literature that comes from abroad as long as it is not directly against the other laws, as my counsel has already pointed out earlier in the session, and that is why I object to having my mail censored, and furthermore, as my counsel objects, as far as—

**Judge Bone:** Do you object to the Police Department's keeping a record of men of questionable character in the field of crime?

**The Witness:** No, sir; not at all.

**Judge Bone:** You don't?

**The Witness:** No. I do not consider this case—

**Judge Bone:** You don't consider that an invasion of [fol. 187] their constitutional rights?

**The Witness:** No. Not if they are criminals.

**Judge Bone:** Not to be molested by having their name on some police file.

**The Witness:** Not if they are criminals.

**Judge Bone:** No one has suggested that you are a criminal; we are talking about a postal regulation of the country. But you realize the implications of this business, that no federal agency can ask any questions about what a man is getting, so long as they don't put you in jail or harm you in any way?

**The Witness:** Oh, that doesn't mean much.

**Judge Bone:** It may not mean much to a Dane who has introduced himself into the country, but it means a great deal to those of us born in the United States.

**The Witness:** Yes, Your Honor, but there is a difference—

**Judge Bone:** I don't want to go to Denmark to get my conception of American life, if you understand.

**The Witness:** All right, Your Honor, but there is a difference, however, in being a criminal and being wracked

down in the mud by certain congressional committees, who do not always use fact, but innuendo to destroy your name.

Judge Bone: Oh, yes, I know, I have served in Congress a great many years, I am quite familiar with the burden [fol. 188] they have to bear in the face of animadversions directed at them. Do you know that few men live a more rugged life than Members of Congress? They are accused of everything under the sun.

The Witness: I am quite aware of that, sir.

Judge Bone: They develop thick hides; there is more said about them than is said about you.

The Witness: I am srre of that.

Judge Bone: Yes. Now, when I say, said about them, I mean bitter criticism.

The Witness: I understand that, sir.

Judge Bone: Yes.

Judge Wollenberg: May I suggest, if there is no further—

Mr. Krause: Yes, Your Honor, I am ready to go on.

Q. Mr. Heilberg, you said you are a citizen of Denmark. Are you considering applying for citizenship in the United States of America?

A. Yes.

Q. Now, I want to show you something I have shown to counsel that is marked Plaintiff's Exhibit 1 for identification, and ask you whether you have seen that before? I will describe it as an envelope containing a card.

A. Yes, I have seen such a thing before; yes.

Q. Where did you see that?

A. I received this in the mail.

[fol. 189] Q. What did you do with it after you received it in the mail?

A. I gave it to you.

Q. Does this card indicate that the post office is holding a publication for you?

A. That's correct.

Mr. Collett: If the Court please, the card speaks for itself.

Judge Bone: Same ruling.

Judge Wollenberg: You want it marked?

Mr. Krause: The envelope has been marked, Your Hon—



or. I would like to offer this in evidence. It's the same form as we have alleged in our complaint.

Judge Wollenberg: May I see the envelope?

Mr. Krause: Yes.

Judge Wollenberg: When did you receive this in the mail, in June? It bears a postage stamp, June or July, it is Jun 12, 1963. Is that about the time you received it?

The Witness: A few months ago, that is correct.

Judge Wollenberg: So this was prior to the time that you filed the suit?

Mr. Krause: This particular card was the reason for the suit.

Judge Zirpoli: This is the card upon which the whole case is predicated, is it not?

[fol. 190] Mr. Krause: That is right.

Judge Zirpoli: Is that it?

Mr. Krause: Not the whole case, Your Honor, but the temporary injunction—

Judge Zirpoli: If you had never received\* this card, there never would have been a lawsuit?

Mr. Krause: Yes, that is correct.

Judge Zirpoli: All right.

Judge Bone: All right. This came airmail, mailed at San Francisco?

Mr. Krause: The post office sends all those airmail in the same city.

Judge Wollenberg: Airmail.

Judge Bone: Yes; they use airmail to deliver mail in San Francisco?

Mr. Krause: That's right. That is the way it is marked.

Judge Bone: Just what sort of a plane is this airmail carried on? That's news to me; I fly airplanes all the time.

Mr. Krause: Is the envelope and the card then in evidence?

Judge Zirpoli: Yes.

Judge Wollenberg: Yes, mark it in evidence; agreeable with you?

Judge Bone: Yes.

[fol. 191] Judge Wollenberg: Mark it in evidence, whatever the number is.

Judge Bone: Introduce all of it, in case it goes to the

Supreme Court, if you are energetic enough to take it there.

The Clerk: Plaintiff's Exhibit 1 admitted and filed in evidence.

(Plaintiff's Exhibit 1, previously marked for identification, was admitted into evidence.)

Judge Wollenberg: To get back, did you want to do anything with these, too? (Indicating.)

Mr. Krause: I will offer those in evidence in just a minute, Your Honor.

Judge Wollenberg: All right.

(Colloquy among the Court out of the hearing of the Reporter.)

Judge Bone: You have more questions?

Mr. Krause: Yes.

Judge Zirpoli: I would like to ask you a couple of questions. After you got this letter, Mr. Heilberg—

The Witness: Yes, sir.

Judge Zirpoli: —you brought it to the office of the American Civil Liberties Union, did you?

The Witness: That's correct.

Judge Zirpoli: All right. And you talked with their lawyers?

[fol. 192] The Witness: Yes.

Judge Zirpoli: All right. And then this suit was instituted?

The Witness: Yes.

Judge Zirpoli: Did you advance any costs or any fees of any kind or character whatsoever?

Mr. Krause: I would like to know what the relevance is?

Judge Zirpoli: Well, the relevancy is that of a question of hardship and there has been an allegation here about spending fees—that you had to spend filing fees and the like. Now, I am interested in knowing: Did you advance one dollar?

The Witness: To the—

Judge Zirpoli: Yes.

The Witness: —to the ACLU?

Judge Zirpoli: Yes.

The Witness: Oh, yes, I paid this year, I paid them a

couple of times, I paid them money. I don't know—it was not—

Judge Zirpoli: You paid dues, or did you pay any money for this case?

The Witness: Well, not directly for the case; I paid dues, and I paid besides that about, I paid support to the organization, but not with the stipulation that it be directly [fol. 193] used for the case.

Mr. Krause: I will stipulate, Your Honor, that the American Civil Liberties Union has advanced the money for the filing fee and Mr. Heilberg is not required to—

Judge Zirpoli: So this litigation, as litigation, does not cost him a five-cent piece?

Mr. Krause: It does not cost him any money.

Judge Zirpoli: All right.

Mr. Krause: However, it will cost the next guy some money.

Judge Zirpoli: Well, you may argue that at the proper time, I was just asking the question.

Mr. Krause:

Q. I want to show you a card marked as Plaintiff's Exhibit 2 for identification and ask you whether you have ever seen that?

A. Oh, yes.

Q. Where did you see that?

A. This, I received in the mail.

Q. Did you receive it just as it is, without that little identifying tag on it?

A. Without this identifying tag, yes.

Q. What is that?

A. That is just like the other one, but it is—was sent wrongly to my address instead of being sent to New York.

Q. What is the address on it?

[fol. 194] A. Robert K. Christenberry, New York, New York, 10001.

Q. Now what does it say on the other side?

A. Instructions to deliver this publication and similar publications, and with my name and address underneath.

Q. Your name and address is on that card and it is checked to deliver this publication and similar publications?

A. That is correct.

Q. Now, did you fill out that card?

A. No.

Q. Did you instruct anyone to fill out that card?

A. No.

Q. Had you ever seen that card before it came to your mailbox?

A. No.

Q. When it came to your mailbox, it was already filled out?

A. That's correct.

Mr. Krause: I would like to offer this in evidence as Plaintiff's Exhibit next in order.

Mr. Collett: Well, let's have a little more foundation on this as to the time as related to the first one here.

Judge Bone: You have more exhibits?

Mr. Krause: Yes; those exhibits, the magazines which we discussed.

Judge Wollenberg: We'd better rule on this first. I don't know whether Mr. Collett has an objection or not; [fol. 195] I didn't understand his remarks.

Mr. Collett: The card has been, to an extent, identified, but I would like to object that a complete foundation hasn't been laid as to the time that it was received and where he received it.

Judge Wollenberg: All right.

Judge Bone: Do you have to introduce all of them, or are some of them exemplars of the general tenor?

Judge Wollenberg: There is only one.

Mr. Krause: This is the last thing I am introducing besides those magazines.

Judge Bone: All right.

Mr. Krause: And I offer this in evidence.

Judge Wollenberg: Can you fix about what date it is, is there a mark on it?

Mr. Krause: Yes.

Judge Wollenberg: Then answer Mr. Collett's question.

Mr. Krause:

Q. Is there a postmark on it, Mr. Heilberg?

A. Yes, sir, there is.

Judge Wollenberg: About when did you receive it?  
 The Witness: Washington, D. C., 12-M 16 September 1963.

Mr. Krause:

Q. Did you receive it in September of 1963?

A. I believe so, three or four months ago, something like that.

[fol. 196] Q. What was that last answer, you believed you received it?

A. I know I received it, but I cannot recall the exact date at this time.

Judge Wollenberg: All right, it may be marked, Mr. Clerk, as next in order. Agreed?

Judge Bone: Yes.

Judge Wollenberg: All right.

The Clerk: Plaintiff's Exhibit 2 admitted and filed in evidence.

(Plaintiff's Exhibit 2, previously marked for identification, was admitted into evidence.)

Mr. Krause:

Q. Now, these two packages containing magazines, Mr. Heilberg—

A. Yes.

Q. —did they come sealed or unsealed?

A. The one came sealed, the other unsealed; the big one unsealed.

Mr. Krause: I would like to offer these as the Plaintiff's next in order, 3 and 4.

Mr. Collett: Well, let's have a look at them.

Judge Zirpoli: When you say "sealed," when you received it, it was sealed?

The Witness: It was sealed, yes, the one.

Judge Zirpoli: All right.

Judge Wollenberg: The one with no description of any [fol. 197] kind on the envelope except the address of the sender and the name?

Mr. Krause: That one was sealed.

Judge Wollenberg: That one was sealed.

Judge Bone: You might tell us how that would stigmatize you when there is nothing on the envelope to inform your neighbors that there was something—

Judge Wollenberg: Nothing on either of them. Let's get the exhibits in.

Judge Bone: Put them in, they are admitted.

The Clerk: Plaintiff's Exhibits 3 and 4 admitted and filed in evidence.

(Plaintiff's Exhibits 3 and 4, referred to above, admitted into evidence.)

Mr. Krause:

Q. Mr. Heilberg, do you recall being in court on another occasion for this lawsuit where we were in the court room of Judge Burke?

A. Yes.

Q. Do you recall then being handed a package by Mr. Elmer Collett?

A. Yes. At that time, I did not know this gentleman had any connection with the post office.

Mr. Collett: Objection. Just answer the question, whether he remembers.

The Witness: Yes.

[fol. 198] Mr. Collett: Move the rest of it be stricken.

Mr. Wollenberg: He said yes. The balance may go out.

Mr. Krause:

Q. Now, did you know that this package he was handing you contained a piece of mail with which you were concerned in filing this lawsuit to receive?

A. No.

Judge Bone: How did you know that?

The Witness: I said, no.


Mr. Wollenberger: He said he did not know.

The Witness: Did not know.

Judge Bone: Oh, you did not know.

The Witness: I did not know.

Judge Bone: All right.





Mr. Krause:

Q. Now, what happened to that package after it was handed to you?

A. I gave it to you.

Q. Did you mean to accept delivery of this piece of mail as a delivery in the regular course of post?

Mr. Collett: Well, I object, if the Court please, calling for—

Judge Bone: Well, I think that is probably irrelevant. If I wrote you a letter, would you refuse to receive it in the mail?

The Witness: Not in the mail, no.

Mr. Krause:

Q. Let me ask you this—

[fol. 199] Judge Bone: Now what was the tender of the piece of mail by Mr. Collett; that was regarded as something suspicious by you?

The Witness: May I explain that?

Judge Bone: Yes.

The Witness: As I said before, I did not know who this gentleman was, and without a word, just come, stuck it in my hand, I didn't know what it was, and so immediately my counsel told me to hand it over to him, because I don't know who the gentleman is, I don't know what the package is that he sticks in my hand, and he didn't say—

Judge Bone: It didn't look dangerous, did it?

The Witness: I wouldn't know what it was. In any case, my counsel told me to—

Judge Bone: Well, was Mr. Collett appearing as counsel in the case then?

The Witness: I think so. I'm not quite sure. I cannot recall who it was. There were more than—well, two or three gentlemen all together.

Judge Zirpoli: Did you ever look at that afterwards?

The Witness: Afterwards, after I had given it over to counsel.

Judge Zirpoli: Yes, you looked at it; where did you look at it, at his office?

The Witness: In the court room.

[fol. 200] Judge Zirpoli: In the court room. All right. When you saw it in the court room, you knew it was the mail that was previously addressed to you, didn't you?

The Witness: Yes, I did.

Judge Zirpoli: All right.

Mr. Krause:

Q. You knew it was mail previously addressed to you?

A. I beg your pardon?

Q. You knew it was mail addressed to you?

A. It was addressed to me, yes.

Q. But you didn't know what was inside, did you?

A. No.

Judge Zirpoli: Am I to understand this man doesn't know to this day what was inside of it?

Mr. Krause: As a matter of fact, I am going to establish now that he has never had that piece of mail, never had it in his possession other than this mere handing of it to him.

Judge Zirpoli: Is that because counsel has never showed it to him?

Mr. Krause: I don't have that piece of mail either, Your Honor.

Mr. Krause:

Q. Where did you see that piece of mail last, Mr. Heilberg?

A. I saw it up at the counsel stand in the court room.

[fol. 201] Judge Zirpoli: As far as you are concerned, you received it and after you received it you turned it over to the lawyer; is that right? Isn't that what happened?

The Witness: I received something in my hand which I turned over to my lawyer, not knowing what it was.

Judge Zirpoli: All right.

Mr. Krause:

Q. Have you expressed any desire to have your mail delivered in the United States Court by the United States Attorney's Assistant?

A. No.

Judge Bone: Now, wait; I don't want to leave this court room with the wrong impression, but it has been suggested here, and apparently without objection, that you said you would accept the mail, wanted it, you would receive it.

Mr. Krause: No, Your Honor, I don't recall that being the testimony.

Judge Bone: Well, the record will show it. In view of what you said just now, you can be very sure that it better be in the record. I don't think my hearing has befuddled me. I think the statement was made here, he would accept the mail and he wanted to have it.

Mr. Krause: Well, let me ask Mr. Heilberg—

Judge Bone: Mr. Collett can tell me if I am entirely wrong.

Mr. Collett: In fact, you repeated it to him.

[fol. 202] Judge Bone: What is that?

Mr. Collett: In fact, you repeated it to him.

Judge Bone: That is right; I was very careful in repeating it.

Mr. Collett: This complaint alleges—

Judge Bone: The record will so show.

Mr. Collett: This complaint alleges that he desires to receive it.

Judge Wollenberg: The complaint says so.

Mr. Krause: The testimony shows that he had physical possession of this piece of mail, we concede that.

Judge Bone: I know, but we are talking about is willing to receiving the mail and wanting it, and he says so in his complaint.

Mr. Krause:

Q. Now, Mr. Heilberg, do you desire to receive any mail whatsoever after it has been processed pursuant to the terms of this statute, that is, Section 4008, after it has been labelled communist political propaganda? Do you desire to receive that mail?

A. That requires a qualified answer.

Judge Bone: Well, give us the best answer you can; I want to know.

The Witness: I want to receive everything, but I do not want it first to be labelled as communist political propa-

ganda and thus my name being on a file which after can [fol. 203] be used by anybody who gets hold of it.

Judge Zirpoli: Well, now, let me ask a question. Supposing the mail came to you and was labelled communist propaganda, you never received a card, but is labelled communist propaganda, and has got a label of the United States Post Office Department on it; would you accept it?

The Witness: Yes.

Judge Bone: Well, that's unequivocal. That was one question. Now, your counsel has asked you about the immigration laws. I want to ask something about that myself. I have some familiarity with them.

Mr. Krause: I have one more question—

Judge Bone: Go ahead.

Mr. Krause: —on this matter, and then I will turn him over to you.

Judge Bone: All right.

Mr. Krause:

Q. Mr. Heilberg, do you have any objection to your mail being delayed through the process of Section 4008?

Mr. Collett: Your Honor—

Judge Wollenberg: I think that's immaterial, whether he has an objection or not.

Mr. Collett: —object to that question as—

Judge Zirpoli: I think we ought to sustain the objection, because he is asking to base it on the statute, and he should base it on the facts.

[fol. 204] Judge Wollenberg: Base it on the facts we have here.

Mr. Krause:

Q. Mr. Heilberg, do you wish to receive your mail as promptly as possible within the operation of the Post Office Department?

A. Yes.

Q. And do you value the fact that mail is delivered promptly?

A. Yes.

Q. And is that important to you in your work?

A. Yes.

Judge Zirpoli: Now, we are talking about mail that's not first-class, unsealed mail, aren't we?

Mr. Krause: Not all unsealed; some sealed mail subject to this statute as long as it is not a letter.

Judge Zirpoli: Yes; so we are not talking about personal correspondence. What we're talking about when we get right down to it is propaganda.

Mr. Krause: Unless it is in a package or magazine.

Judge Zirpoli: But we are talking about propaganda, aren't we?

Mr. Krause: Well—

Judge Zirpoli: And your objection is to the delay that occurs in the sending of propaganda to you, isn't that right?

The Witness: That also requires a qualified answer [fol. 205] because very seldom do you find propaganda only as propaganda. It is usually hidden among cultural aspects, like ballet or music, anything else.

Judge Zirpoli: All right. Let's include, in addition to propaganda, we'll include cultural articles that relate to music and art and ballet, and you insist upon the prompt delivery of that, is that right?

The Witness: Yes, sir.

Judge Zirpoli: And by the prompt delivery of that, you mean no unreasonable delay of one day or two days or half a day?

The Witness: No unreasonable delays.

Judge Zirpoli: Yes. That you would deem an unreasonable delay, one day or two days?

The Witness: I would.

Judge Zirpoli: All right.

Mr. Krause:

Q. Do you object, Mr. Heilberg, to the Customs Service labelling certain mail as propaganda?

A. Yes.

Q. Why?

Judge Bone: I don't know. That sort of a question. Certain mail being labelled propaganda. Just what does counsel mean by that question?

Mr. Krause: I mean classified as propaganda under the



terms of this statute; when the foreign mail flows in, some of it is siphoned off and called propaganda.

[fol. 206] Judge Bone: Do you think this man's opinion—

Judge Zirpoli: Is this a strong point being urged by the plaintiff in this case? Are you really urging as one of the strong points of the screening process of the Customs Service? I would like to know—

Mr. Krause: Yes.

Judge Zirpoli: —whether this is one of the serious contentions.

Mr. Krause: I will say we don't, as Mr. Blease said, we don't object to the screening of things coming from foreign countries. We know that is done for customs duties—

Judge Zirpoli: I would like to know where his basic constitutional right is here, is it the screening process or is it, in the final analysis the only basic constitutional right about which he is complaining, in the final analysis, this list; isn't this all your case is on?

Mr. Krause: No.

Judge Zirpoli: And isn't the rest of it so much dressing?

Mr. Krause: No. The list is an important part, but the screening and the labelling is also an important part.

Judge Zirpoli: Which is the most important, or there is no most important part?

Mr. Krause: I think to Mr. Heilberg, to my client—

Judge Zirpoli: Because we are going to decide whether [fol. 207] you have a real controversy here, and whether this is moot; and that's dependent in great measure upon the degree to which it has some significance to him, the degree to which it imposes a hardship on him.

Now, this has to be real. You can't indulge in academic discussions and theoretical discussions of hardship when you ask the Court to take a matter on as a case or controversy.

Mr. Krause: Well, the injury to him flows primarily from the list, that's what he complains about, that's what he objects to.

Judge Zirpoli: Then why don't we pay attention to that which may be of some significance in the turning point in the ultimate ruling of this Court?

Mr. Krause: Well, I will, Your Honor, but I don't want



to give you the idea that I don't think that he has the right to complain about—

Judge Zirpoli: Well, I don't know, you give me the idea, with all these other extraneous matters, that you may think your case is pretty weak on something that may have some significance, I don't know.

Mr. Krause: No, I am sorry if I give you that idea, because I certainly don't think that. I think that we have a strong case that the government can screen mail for some purposes and can't screen mail for others. They can't screen mail, for instance, they couldn't examine all our mail [fol. 208] to look for evidence of criminal violations.

Judge Zirpoli: Counsel has admitted that they could prohibit it altogether, entirely, if they want.

Mr. Krause: I think they could prohibit this foreign propaganda if they wanted to, but they have not; they have screened it and they have labelled it, which is something different.

Mr. Krause:

Q. Mr. Heilberg, perhaps you could tell us why you object to having your name on a list?

A. Well, when I apply for citizenship papers, they might go back and find out that I have been wishing to receive communist literature, and that might be counted against me. They might think that it means that I have communist sympathies.

Judge Zirpoli: They could determine that by asking you a very simple question, couldn't they? They don't have to look at any list, all they have to do is to ask you to be sworn to tell the truth, and nothing but the truth, and say to you, do you desire to receive communist literature, and assuming you would tell the truth, you would say yes.

The Witness: That's correct.

Judge Zirpoli: All right. Now what's detrimental about that to you, what difference does that make?

The Witness: Because in this country for many reasons people sometimes look at people who receive communist literature as fellow-travelers.

[fol. 209] Judge Zirpoli: You say, "this country." Are

you classifying the country as a whole, are you indicting now the entire country and the people?

The Witness: I am not indicting the people, Your Honor, I am just stating that there are conditions—

Judge Zirpoli: You mean certain government officials might take this point of view, is that what you are trying to tell us?

The Witness: Perhaps; perhaps one could say that. I have been in many different countries, Your Honor, and conditions are different in different countries. Some places they would not classify political propaganda at all, you are at complete freedom to read anything you want from whatever political false idea you want to without any classification whatever. Now, this is not the case in the United States.

Judge Zirpoli: Have you studied the customs and postal regulations in other countries of the world? Do you know what the Italian Government does, for instance? Do you know what the German Government does, for instance, do you know what it does in relation to East Germany mail? Do you know these things?

The Witness: I know, Your Honor, because I personally have experience in it.

Judge Zirpoli: All right. I am amazed and pleased to see that we have finally achieved a position in which we have a real world authority before us in postal matters. [fol. 210] And now, since we have, Mr. Krause, it might be well for you to qualify him in all these respects, and establish specific facts.

Mr. Krause: Well, he is not an expert, but he has travelled and lived in—

Judge Zirpoli: Well, the whole thing is what is going on now, this is now a situation in which, instead of getting to the actual facts, maybe the Court's partly responsible, there is an exposition of too much on his personal views, which isn't the problem before us.

Mr. Krause: I am perfectly willing to cut it off. I have no further questions at this point.

Judge Bone: Now, your counsel has spoken of the immigration laws. Let's dally with that idea for a moment. Do you consider that you have committed a crime against the republic?

The Witness: No.

Judge Bone: You are sure of this?

The Witness: Sure, I'm sure.

Judge Bone: All right. You have committed no offense for which you could be indicted, prosecuted and imprisoned.

The Witness: No.

Judge Bone: Before you came to the United States, had you chalked up any kind of a criminal record in Denmark or any other place?

The Witness: No.

[fol. 211] Judge Bone: So you come to the United States—

The Witness: Yes, one difference. In Communist Bulgaria, I was arrested by the Secret Police, by the Communist Police, and deported for having spoken against the Communist Party, against the Soviet Union, against the regime—

Judge Bone: All right.

The Witness: —et cetera. So that's one place I have been—

Judge Bone: All right. Now, that would be your only so-called criminal record, if it was one?

The Witness: Right.

Judge Bone: Just how much do you know about admission to citizenship? A criminal record, and you say you do not have one, and you have not committed any crime against the laws of this country; how do you think this could be invoked against you in the citizenship application? They generally scrutinize a man's record to find out whether he has a criminal record, and you have none. Think that one over, before you answer.

The Witness: I have thought that one over, Your Honor.

Judge Bone: Yes. How much meditation did you give it?

The Witness: This is—I think this slightly irrelevant, because in this country—

Judge Bone: No, you made it relevant.

The Witness: No, Your Honor. In this country, certain political opinions could also have inference. If [fol. 212] for example, a communist or a communist sympa-

thizer came from another place and wanted to get a citizen's papers here and they found out he wanted to read that literature, and so forth and so on, and you are a sympathizer, wouldn't that be held against him?

Judge Bone: It is probably, at least.

Judge Zirpoli: May I ask: The basic question is a question of your attaching the principles of the Constitution of the United States, that's the basic requirement for citizenship?

The Witness: Right.

Judge Zirpoli: All right, now, the Court is asking you how any of these acts would adversely affect you in connection with your application; in your judgment, how would they?

The Witness: I do not know.

Judge Zirpoli: What is your fear that you have? Do you have a real fear, or is this an imagined fear, is this a theoretical fear based upon the carrying of civil right principles into the realm of theory, forgetting for the moment the practical problems of daily life?

The Witness: No, I consider it a real fear. As I say, political attitude does have some bearing, I'm sure, upon the acceptance of me as a citizen of the United States, and therefore, being on a file of people who do wish to receive communist propaganda, so-called, I think that if the F.B.I. and other agencies which might gain information from [fol. 213] the postal files, if they use it against me, they could prevent me from getting citizenship.

Judge Bone: Do you think the police of this country, the law-enforcing authorities, should wear handcuffs, so they can't inquire about anybody, and any man could come into the country and lie, if he wanted to, to leap over the immigration barriers, such as they are, is that your idea?

The Witness: No, Your Honor.

Judge Bone: Well, you said you are not a criminal, you committed no crime, you averred that very staunchly.

The Witness: That's correct.

Judge Bone: And you think that some court would deny you citizenship when you have a clean record in the criminal field?

The Witness: Yes, I believe they can still do so.

Judge Bone: Oh, you think judges who preside over immigration hearings—

Judge Zirpoli: (Interposing.) Is this a genuine fear on your part?

Judge Bone: Do you think they would rev up some spirit of opposition to you that would destroy your chances of becoming a citizen?

The Witness: It is a fear, it is not my whole objection.

Judge Bone: You don't have much faith in the American judicial system, do you?

[fol. 214] The Witness: Oh, yes, I have, very much so; that is why I am here.

Judge Bone: Oh, you have. Yet in the same breath you say the Immigration authorities, presenting your case before a judge when you seek admission to citizenship, would compel you to confront a judge who was probably prejudiced against you?

The Witness: Not prejudiced.

Judge Bone: You're making a wonderful record here of intense loyalty, very fervent loyalty to the system into which you want to introduce yourself as a citizen.

The Witness: I think that is twisting the case a little bit.

Judge Bone: No, it isn't twisting it. I asked you particularly about the judges who would be called upon to admit you to citizenship. You said they probably would have predilections, or words to that effect—

The Witness: No.

Judge Bone: I would be the last man on earth—

The Witness: Not prejudiced—

Judge Bone: —to attribute that sort of an attitude to American judges in immigration cases; that's a pretty broad indictment.

The Witness: —not prejudiced, but judging according to political convictions, perhaps.

Judge Bone: Just what political convictions would you say this court has, from your brief acquaintance with it?

[fol. 215] The Witness: Upon my political convictions, they might consider that because I want to see such literature, that I might be undesirable.

Judge Zirpoli: As what, for what purpose?

The Witness: As a person, because the Communist



Party in the United States is indicted, so they perhaps would consider that a person who wants to receive political literature from communist countries might be an undesirable alien, who they would not want to give United States citizenship.

Judge Zirpoli: Have you had a university education?

The Witness: I beg your pardon?

Judge Zirpoli: Do you have a university education?

The Witness: I have had a couple of years of university education, Your Honor.

Judge Bone: Do you know of one instance, and you correspond with people all over the world, of one instance where a man has been denied citizenship on the basis of having received some communist literature?

The Witness: I do not know—

Judge Bone: Now, you told us that you have a wide understanding of this problem—

The Witness: Yes.

Judge Bone: —before this court. Name one case, will you?

Judge Wollenberg: He said he knows none.

[fol. 216] The Witness: I said I know no case.

Judge Bone: So, with your knowledge of the American system, of the judicial system and American culture, you know of no case where a man was denied citizenship on the grounds that you presented here. It is a very illuminating picture of a man frightened about something that probably never in the world would happen.

The Witness: Probably. However, if we take the other aspect of the same case, I might be called up for an investigation by the H.U.A.C. Then what would happen—

Judge Bone: Called up by whom?

The Witness: The House Committee of the un-American Activities.

Judge Bone: Are you violently opposed to that?

The Witness: I wouldn't say violently, I would say opposed; I am not violently opposed to it.

Judge Bone: Well, that was a slip of the tongue. Are you opposed to the existence of such a committee?

The Witness: To a certain degree, yes; and to their methods in particular, very much so.

Judge Bone: Then you, sir, are animated by political



and other emotions that have to do with the American system. The Congress of the United States created that committee, didn't it?

The Witness: Yes.

[fol. 217] Judge Bone: And you don't like that.

The Witness: I do not like the committee; that doesn't mean I don't like the United States Congress.

Judge Bone: You do not like the United States Congress.

The Witness: I did not say so.

Judge Bone: But you didn't like its instrument—

The Witness: I do not like the methods—

Judge Bone: —the House un-American Committee, which Congress created.

The Witness: Ah, there are individuals who happen to be at the top of this same committee who use methods which are not very factual. This is a process—

Judge Bone: Are you an expert in the effectiveness of the laws of the land?

The Witness: It's not an effectiveness of the laws; no people has been put under indictment, but the way people have been smeared by the committee by being questioned in certain manners, which there is history of, that I would not like to be personally—

Judge Bone: Oh, yes, I have so much of that, that it almost makes me dizzy to run across any further comments on it.

The Witness: All right, I shall not make any further comments.

Judge Bone: We might smear prosecuting attorneys for prosecuting men of ill will who annoy women on the streets.

[fol. 218] There may be a lot of people don't like that, they think the fellow should be allowed to annoy women, and even beat them up.

The Witness: That's not the case, Your Honor. We are not talking about that.

Judge Bone: All right.

Judge Zirpoli: Mr. Heilberg, I still want to get to this question—

The Witness: Yes, sir.

Judge Zirpoli: —presumably your fear, or some of

the factors involved in this case, and I find it most difficult, I must say to you most frankly, I find it most difficult to believe that you have a genuine fear that your name on this list would jeopardize your application for citizenship. I find this difficult. I have a feeling that this makes for a proper argument, but it's not a genuine fear that you feel, that's the whole thing. I'm not convinced you have this fear.

The Witness: Well——

Mr. Krause: Is there any other question you could ask him to make sure?

Judge Zirpoli: Well, you know that citizenship is given to you by the courts, do you not?

The Witness: Yes.

Judge Zirpoli: Do you know you have a right of review by the court, do you?

The Witness: Yes, Your Honor.

[fol. 219] Judge Zirpoli: And so you have a genuine fear that a court will deny you citizenship because your name was placed upon a list of persons receiving communist propaganda. That's right, that's your position?

The Witness: That might have some bearing on it.

Mr. Krause: Your Honor, may I say this, that I hate to see it look like Mr. Heilberg doesn't believe in the justice of the American courts. As he said, he has brought this case in for a ruling of the American courts. However, in citizenship cases, a recommendation is made by the Immigration and Naturalization Service, and, regardless of what the court does with that recommendation, it can be harmful to a person to have an adverse recommendation.

Judge Zirpoli: Do you know of any adverse recommendations, Mr. Krause? You have had a lot of these citizenship cases, based upon someone's name being on that list?

Mr. Krause: I know of a recommendation based on much flimsier——

Judge Zirpoli: I didn't ask you that question, Mr. Krause. Do you know of a single situation based upon someone's name being on a list?

Mr. Krause: No. Oh, on a list? Yes.

Judge Zirpoli: On a postal list, to start.

Mr. Krause: On this particular list that we are talking about in this case?

[fol. 220] Judge Zirpoli: No.

Mr. Krause: No, but if you want my prediction, I think it will happen, and if Mr. Heilberg would ask me about it, I would advise him that way. He hasn't asked me so far.

Judge Zirpoli: Do you think predictions and speculations on future possibilities constitute a basis for a court declaring an Act of Congress unconstitutional?

Mr. Krause: I think Mr. Heilberg has shown you the deterrent effect of this labelling of mail and the fact that his name is on a list. Whether Mr. Heilberg would be granted or denied citizenship, I think, is not really relevant here. What is relevant is that Mr. Heilberg—

Judge Zirpoli: I agree with you, but I am trying to determine in my own mind whether this is sincere and genuine, or whether this is just a concept of the imagination for the purpose of bolstering a case that now appears to be moot, and which the harm originally claimed no longer exists. That's what I am worrying about.

Mr. Krause: Your Honor, I have had people come into my office and said that they are applying for citizenship, and they are afraid to subscribe to the Nation magazine or the New Republic, or anything else that is in any way not the same as the San Francisco Chronicle or the Examiner or the Call-Bulletin in its political outlook. In other words, there is a real fear among people applying for [fol. 221] citizenship that some derogatory information will be developed, and this isn't something that can be said to be theoretical, this is something that can be said to be real, and if this program continues in its operation, in my experience there are going to be people deterred from receiving communist political propaganda because of the fact that a listing might be used against them, and on the merits we are going to present evidence that those people exist, people who had not only not sent in a card, they would not file suit either; they would not receive this political propaganda because they would be afraid it would be used against them.

Now, if we can show that injury, and we think we can, and the government is acting unconstitutionally, a question which they are afraid to face, because they tried to moot this case, then I think we have a good cause of action, and I think we should win this case because I think it's a

First Amendment freedom not to be deterred in your reading.

Judge Bone: Do you know of a single case that you could identify where a man was denied citizenship by a court because he read the New Republic?

Mr. Krause: I know of a case where a recommendation was made against a man because he had subscribed to the Nation magazine.

Judge Zirpoli: That was only one of probably ten or fifteen facts that went up to make the full story, that wasn't the whole story.

[fol. 222] Mr. Krause: That was one of the relevant facts, Your Honor.

Judge Zirpoli: One of many.

Mr. Krause: And another relevant fact—

Judge Zirpoli: So it took considerably more than that for such a recommendation, didn't it?

Mr. Krause: And it wasn't accepted either.

Judge Zirpoli: It was not accepted by the Court?

Mr. Krause: That is right.

Judge Bone: For many years, I read both those magazines, and no one tried to have me impeached or kicked out of office, and I was in some comparatively respectable offices. You have made the first suggestion that a fellow might be in serious trouble for reading the Nation and the New Republic. I read both of them for years.

Mr. Krause: I was quite surprised when I heard it from an immigration officer.

Judge Bone: How would you classify my taste in literature, as endangering me as a judge?

Mr. Krause: Well, I'd better say that—

Judge Bone: Yes. Well, be—

Mr. Krause: I'd better hold off on that question.

Judge Bone: Well, be frank and be brave—

Mr. Krause: I don't think—

Judge Bone: You're tilting lances in this field of [fol. 223] civil rights.

Mr. Krause: I don't think the Nation or the New Republic is going to harm you or anyone else; I don't think reading the Peking Review or Pravda or any other communist political propaganda is going to harm anyone. Anyone that takes the trouble to read that dry stuff, like

Pravda or the Peking Review, is of a certain intelligence, so he is not going to be influenced by it unless he is already very partial to it, and that's not going to make any difference. So I am outraged that the government would take it upon itself to try to tell the U. S. citizen what is or what is not propaganda.

Judge Bone: Anything further?

Mr. Krause: No, Your Honor.

Judge Bone: Now, when we leave this case today, we are going to leave it suspended in air for a while, subject to call of counsel to appear again.

Judge Wollenberg: I think you're ready to submit the motion, are you not?

Judge Zirpoli: Are both sides in agreement that everything that has to go into this record on the motion to dismiss is now in the record?

Mr. Krause: Yes, Your Honor.

Mr. Collett: If the Court please, I might ask one question: Whether I have to take the stand and recite what happened down in Judge Burke's Court in the presentation [fol. 224] of the document which I identified——

Judge Wollenberg: Your affidavit is on file.

Mr. Collett: My affidavit is on file.

Judge Wollenberg: And you stand on that affidavit, do you not?

Judge Zirpoli: We can evaluate that.

Mr. Collett: Yes, sir.

Judge Wollenberg: You stand on your affidavit?

Mr. Collett: Yes, sir.

Judge Wollenberg: You don't wish to correct that in any way?

Mr. Collett: No.

Judge Wollenberg: All right, then, I think your evidence is in the record.

Mr. Krause: May we submit the transcript of the proceedings before Judge Burke?

Judge Zirpoli: How long would it take you to do it?

Mr. Krause: It will take me a very short time to request it.

Judge Wollenberg: That's what I mean, you haven't inquired of the Reporter how long it will take?

Mr. Krause: No. It is only about a half hour.



Judge Wollenberg: That's all right, certainly.

Mr. Krause: We will submit that as soon as we can.

Judge Wollenberg: As soon as you can get it.

[fol. 225] Judge Bone: Well, we will stand—

Mr. Collett: May I ask one question of Mr. Heilberg?

Judge Wollenberg: Pardon me, I didn't realize.

Mr. Collett: Excuse me, Your Honor.

### Cross-examination.

By Mr. Collett:

Q. With regard to any potential, probable or otherwise, application for citizenship, if you were asked questions with regard to whether or not you received communist propaganda, you would tell the truth that you did, would you not?

A. Naturally.

Q. And you don't expect to conceal anything in the course of your application, do you? You don't expect that the presence of your name on any list is going to reveal something that you won't otherwise reveal in the course of any interrogation that may be conducted during the process by which you finally appear before a court, is that correct?

A. Yes.

Mr. Collett: That's all.

Judge Bone: This Court will stand at recess subject to further call.

Judge Wollenberg: All right, and the motion is submitted.

Judge Bone: Yes, the motion to dismiss is submitted.



[fol. 225a] IN UNITED STATES DISTRICT COURT, NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

PLAINTIFF'S EXHIBIT No. 1

No. 41660

Filed January 2, 1964, James P. Welch, Clerk.

By [Copy Illegible], Deputy Clerk.

UNITED STATES POST OFFICE  
FOREIGN PROPAGANDA UNIT  
STATION B - CUSTOMS HOUSE  
~~SAN FRANCISCO 26, CALIF.~~  
OFFICIAL BUSINESS

P-433

PENALTY FOR PRIVATE USE TO AVOID  
PAYMENT OF ADD'L. 1305  
JUL 12 5 30 PM '63  
VIA AIR MAIL

~~XXXXXXXXXXXX~~

2896

DELIVER

☐ THIS PUBLICATION

☐ SIMILAR PUBLICATION

INSTRUCTIONS

Aug. 2, 1963

(Date)

DO NOT DELIVER

☐ THIS PUBLICATION

☐ SIMILAR PUBLICATION

"A Proposal Concerning The General  
Line of The International Communist  
Movement" 1963, 1 copy

Leif Heilberg  
1801 Page Street  
San Francisco 17, Calif.

POD Form 2153-X, Jan. 1963

MESSAGE TO ADDRESSEE

This office is holding unsealed mail matter addressed to you from a foreign country. Under Public Law 87-783, the Secretary of the Treasury has determined this mail to be Communist political propaganda. It cannot be delivered to you unless you have subscribed to it, or otherwise want it. Please check the appropriate spaces under "Instructions" on this card and return the card. If your reply is not received by the date indicated, it will be assumed that you do not want to receive the publication(s) listed, or any similar publication. This mail will then be destroyed.

Postmaster

[fol. 225c]

**POST OFFICE DEPARTMENT**

**OFFICIAL BUSINESS**

**PENALTY FOR PRIVATE USE TO AVOID  
PAYMENT OF POSTAGE, \$300**

**VIA AIR MAIL**

**Postmaster**

**FOREIGN PROPAGANDA UNIT  
STATION B - CUSTOMS HOUSE  
SAN FRANCISCO 26, CALIF.**

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*(City and State)*

[fol. 225d] IN UNITED STATES DISTRICT COURT, NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

PLAINTIFF'S EXHIBIT No. 2

No. 41660

Filed January 2, 1964, James P. Welsh, Clerk.

By [Copy Illegible], Deputy Clerk.

INSTRUCTIONS

(Date)

DELIVER

DO NOT DELIVER

- ☒ THIS PUBLICATION  
☒ SIMILAR PUBLICATION

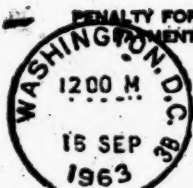
- ☐ THIS PUBLICATION  
☐ SIMILAR PUBLICATION

Leif Heilberg  
1801 Page Street  
San Francisco, California

[fol. 225e]

POST OFFICE DEPARTMENT

OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID  
FORFEITMENT OF POSTAGE \$600**"ABCD" MAIL**  
**BETTER BUSINESS \$****Postmaster Robert K. Christenberry****New York, New York 10001****(City and State)**



[fol. 226]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

[Title omitted]

ORDER DENYING MOTION TO DISMISS—January 10, 1964

Based upon the record presently before it, the Court cannot say that the case is moot, nor that it fails to present a true controversy and a substantial question of constitutional law.

It Is Therefore Ordered that the Motion to Dismiss is hereby denied.

Dated: January 10, 1964.

Homer T. Bone, United States Circuit Judge, Albert  
C. Wollenberg, United States District Judge, Al-  
fonso J. Zirpoli, United States District Judge.

Copies to counsel and judges 1/16/64.

[fol. 227]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

DEFENDANTS' ANSWER TO COMPLAINT—Filed January 24,  
1964

Now come the defendants, by their attorneys, Cecil F. Poole, United States Attorney, and Charles Elmer Collett, Assistant United States Attorney, and in answer to the complaint filed herein by plaintiff Heilberg, say:

### First Defense

1. The defendants deny the allegations contained in paragraph 1 of the complaint.

2. The defendants deny the allegations contained in paragraph 2 of the complaint.

3. Answering paragraph 3 of the complaint, the defendants admit that they are charged with the enforcement of the provisions of 39 U.S.C. Section 4008, but deny that said statute is unconstitutional.

4. Defendants admit the allegations contained in paragraph 4 of the complaint.

[fol. 228] 5. Answering paragraph 5 of the complaint, the defendants state they have no knowledge whether plaintiff ordered the unsealed mail matter in question, but that upon his statement that he desired to receive such unsealed mail matter, it was delivered to him. The defendants further allege that all such unsealed mail matter will be delivered to him in the future without further inquiry.

6. Answering paragraph 6 of the complaint, the defendants admit that an index is maintained of persons who indicate on POD Form 2153-X, January, 1963, that they desire to receive delivery of unsealed mail matter determined to be Communist political propaganda addressed to them. Defendants allege that this index is maintained solely as a convenience to facilitate the expeditious delivery of such mail without repeatedly requesting the addressees to signify willingness or unwillingness to accept such unsealed mail matter addressed to them. Defendants allege that instructions have been issued prohibiting release of said names, except with the express permission of the Post Office Department in Washington. (See Affidavit of Tyler Abell, Associate General Counsel, Post Office Department, attached hereto and marked defendants' Exhibit A.) The remaining allegations of paragraph 6 are conjectural and speculative. Defendants deny that any adverse inference may properly be drawn from inclusion of a name on such index.

7. Answering paragraph 7 of the complaint, the defendants admit that the use of said index is not restricted by law, and allege the names will be disclosed only by the express permission of the Post Office Department. Defendants otherwise deny the factual allegations of paragraph 7.

8. The defendants deny the allegations contained in paragraph 8 of the complaint and allege that the defendants have already delivered said unsealed mail matter to the plaintiff.

[fol. 229] (On October 29, 1963 an order was entered dismissing the complaint filed by the plaintiff Krause. Accordingly, no answer is required as to paragraphs 9 through 15, inclusive, of the complaint.)

9. Answering paragraph 16 of the complaint, the defendants deny that 39 U.S.C. Section 4008 is unconstitutional on its face. Non-preferential unsealed mail is not accorded the privilege of secrecy given first class mail. Moreover the statute is designed to permit the non-delivery of large quantities of unsealed mail matter determined to be Communist political propaganda which most people do not want to receive and which they should not be required to receive against their wishes.

The defendants further deny that the statute violates plaintiff's right to freedom of speech, press, or association and privacy or in any manner infringes his constitutional rights under the First Amendment to the Constitution of the United States. No person is ever precluded from receiving such unsealed mail matter and making his own decision as to whether or not, in his opinion, it is Communist political propaganda.

The defendants further deny that the statute deprives plaintiff of due process of law under the Fifth Amendment to the Constitution of the United States. The exemption of certain groups permitted to receive such unsealed mail matter without inquiry were included in the law, not because these groups are better able to discern propaganda, but because Congress recognizes that such groups would obviously desire to receive this type of unsealed mail matter and, therefore, there was no necessity to inquire of their desires.

Moreover the standards for determining what constitutes "Communist political propaganda" are neither vague nor uncertain, nor do they fail to provide the opportunity for notice or hearing. On the contrary, in defining [fol. 230] Communist political propaganda for the purposes of 39 U.S.C. Section 4008, Congress incorporated

the definition contained in the Foreign Agents Registration Act, 22 U.S.C. Section 611, which has been in effect for many years.

10. Answering paragraph 17 of the complaint, the defendants deny that the material entitled "A Proposal Concerning the General Line of the International Communist Movement" is now in possession of the defendant Fixa as said material has been delivered to the plaintiff. Defendants furthermore deny that an order is needed restraining them from detaining plaintiff's unsealed mail matter, since instructions have already been issued that all such unsealed mail matter addressed to him be not detained. (See affidavit of Louis J. Doyle, General Counsel, Post Office Department, heretofore filed.)

11. The defendants deny each and every allegation in the complaint not expressly admitted, denied, or otherwise qualified herein.

#### Second Defense

The complaint fails to state a claim upon which relief may be granted.

#### Third Defense

There is no legal basis or justification for the Court to restrain the defendants from enforcement, operation, or execution of 39 U.S.C. Section 4008; as defendants are not charged with having failed to deliver any unsealed mail matter addressed to the plaintiff which he desires to receive.

#### Fourth Defense

The complaint fails to state a justiciable issue concerning any interest of the plaintiff remaining to be adjudicated by the Court.

[fol. 231]

#### Fifth Defense

The Court lacks jurisdiction over the subject matter of the complaint as no substantial question is presented.

Wherefore, the defendants, having fully answered the allegations contained in the numbered paragraphs of the

complaint of the plaintiff, pray that the complaint herein be dismissed, with costs taxed against the plaintiff.

Dated: January 24, 1964.

Cecil F. Poole, United States Attorney. /s/ Charles  
Elmer Collett, Assistant United States Attorney,  
Attorneys for Defendants.

CERTIFICATE OF SERVICE BY MAIL (omitted in printing.)

[fol. 232] EXHIBIT A TO DEFENDANTS' ANSWER

TYLER ABELL, ASSOCIATE GENERAL COUNSEL  
Post Office Department

I, Tyler Abell, do hereby swear to the following facts:

1. The administration of § 305 of Public Law 87-793 was under my control during the first part of 1963 when I held the position of Special Assistant to the Postmaster General. In this capacity I arranged for the establishment of all the now existing Foreign Propaganda Units, and gave oral, as well as written, instructions to the Foreign Propaganda Units.

2. One of the points covered in the establishment of each Propaganda Unit was an instruction that the file kept on addressees to whom propaganda had been sent would not be made public and that no part of this file could be released to any person, U. S. government agency or other group, except with express permission from Post Office Department headquarters in Washington.

3. Although my position changed from that of Special Assistant to the Postmaster General to Associate General Counsel in May, 1963, I have continued to oversee the Communist propaganda program. There have been no requests from any of the field offices for permission to release

the above mentioned files, nor have any instructions been given from Washington.

Tyler Abell, Associate General Counsel.

UNITED STATES OF AMERICA,  
District of Columbia, ss:

Sworn to before me this 13th day of December, 1963.  
Lawrence B. Gowen, My Commission expires April 30,  
1966.

[fol. 233] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

No. 41660

AMENDMENT TO COMPLAINT AND NOTICE OF MOTION—Filed  
April 14, 1964

To the above-named defendants and their attorneys:

Please Take Notice that on April 23, 1964 at 10 A.M. in Room 244 of the Post Office Building, San Francisco, California, plaintiff by his attorneys will move the Court to allow the amendment of his pleading in the following respects.

1. Where ever the name "J. Edward Day" appears in said pleading, substitute the name of his successor in office, John A. Gronouski.

2. Add to paragraph XVI of said pleading, the following: "4. It violates plaintiff's right to be free of unreasonable searches and seizures in his papers and effects as [fol. 234] guaranteed by the Fourth Amendment to the Constitution of the United States of America."

Date: April 13, 1964.

Marshall W. Krause, Coleman Blease.



## Order

Pursuant to Rules 25(d) and 15(a) of the Federal Rules of Civil Procedure, plaintiff's complaint is ordered amended as set forth above.

Date: —.

—, —, United States Circuit Judge, —, —,  
United States District Judge, —, —, United  
States District Judge.

CERTIFICATE OF SERVICE (omitted in printing.)

[fol. 235]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

[Title omitted]

INTERROGATORIES TO DEFENDANT JOHN F. FIXA—Filed April  
20, 1964

Please answer separately and fully the following interrogatories under oath as provided in Federal Rule of Civil Procedure 33:

1. Is the statement of Tyler Abell, Associate General Counsel of the Post Office Department, appended to plaintiff's Points and Authorities in opposition to Motion to Dismiss as Appendix III, accurate as to the current practice and division of responsibilities of the Post Office Department and the Treasury Department on the administration of 39 U.S.C. § 4008?

2. If not, please state in what particulars the current practice and division of responsibilities differ.

3. What countries are currently determined to be within the purview of 39 U.S.C. § 4008 (b)?

4. Is the mail of any country which is currently determined to be within the purview of 39 U.S.C. § 4008 (b) *not* being screened pursuant to the administration of 39 U.S.C. § 4008? If so, which countries?

[fol. 236] 5. Approximately how many pieces of mail were received by the propaganda screening unit in San Francisco in 1963 and in the months of January and February, 1964.

6. Approximately what percentage of said mail was determined to be:

- (a) Exempt mail
- (b) propaganda

7. How many persons are employed in the propaganda screening unit in San Francisco by:

- (a) The Post Office Department
- (b) The Treasury Department.

8. With respect to the persons referred to in question 7, state their names, the Department for which they work, their functions with respect to the administration of the screening program and their language specialties.

9. How is it determined whether mail matter has been ordered by subscription?

10. Approximately how many pieces of mail were destroyed by the San Francisco screening unit during 1963 and during the months of January and February, 1964, as not desired by the addressee?

Date: April 3, 1964.

/s/ Marshall W. Krause, Attorney for Plaintiff.

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ACKNOWLEDGEMENT OF SERVICE (omitted in printing.)

[fol. 237] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

[Title omitted]

INTERROGATORIES TO DEFENDANT GEORGE BROKAW—Filed  
April 20, 1964

Please answer separately and fully the following interrogatories under oath as provided in Federal Rule of Civil Procedure 33:

1. Is the statement of Tyler Abell, Associate General Counsel of the Post Office Department, appended to plaintiff's Points and Authorities in opposition to Motion to Dismiss as Appendix III, accurate as to the current practice and division of responsibilities of the Post Office Department and The Treasury Department on the administration of 39 U.S.C. § 4008?

2. If not, please state in what particulars the current practice and divisions of responsibilities differ.

3. What countries are currently determined to be within the purview of 39 U.S.C. § 4008(b)?

[fol. 238] 4. Is the mail of any country which is currently determined to be within the purview of 39 U.S.C. § 4008(b) not being screened pursuant to the administration of 39 U.S.C. § 4008? If so, which countries?

5. Approximately how many pieces of mail were received by the propaganda screening unit in San Francisco in 1963 and in the months of January and February, 1964?

6. Approximately what percentage of said mail was determined to be:

(a) exempt mail

(b) propaganda?

7. How many persons are employed in the propaganda screening unit in San Francisco by:

(a) The Post Office Department

(b) The Treasury Department?

8. With respect to the persons referred to in question 7, state their names, the Department for which they work, their functions with respect to the administration of the screening program; and their language specialties.

9. With respect to that mail matter which is examined to determine whether it is "Communist political propaganda" within the meaning of 39 U.S.C. 4008:

- (a) Is each piece which is examined, opened and read?
- (b) If not, then how is the determination of classification arrived at?

10. What training is given those employees charged with the responsibility of determining whether mail is "Communist political propaganda"? In answering this question, please state:

- (a) How many hours are devoted to such training?
- (b) Who supervises the training?
- (c) What written and oral instructions are given regarding the standards to be applied?
- (d) What training materials are used. Include the name and description of any mail matter which is used as a sample or guide of matter properly classified as "Communist political propaganda."

[fol. 239] 11. State the names of twenty publications which are representative of mail which has been determined by the San Francisco screening unit to be "Communist political propaganda."

Date: April 3, 1964.

/s/ Marshall W. Krause, Attorney for Plaintiff.

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ACKNOWLEDGEMENT OF SERVICE (omitted in printing.)

[fol. 240]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

ORDER GRANTING MOTION TO AMEND COMPLAINT, OVERRULING  
OBJECTIONS TO INTERROGATORIES, FIXING DATE FOR PRE-  
TRIAL AND DATE FOR TRIAL—April 28, 1964

The Court has before it plaintiff's motion to amend the complaint and defendants' objections to interrogatories.

The motion to amend the complaint is granted.

The objections to the interrogatories addressed to the defendants John F. Fixa and George Brokaw are overruled, and said defendants are directed to answer each of the same, within fifteen days from the date of filing of this Order, unless it is claimed that the answer to any question will jeopardize or otherwise affect the national security or foreign policy of the United States. All such claimed exceptions shall be submitted to the Court in writing with a statement of the reason therefor.

[fol. 241] This matter is continued to September 15, 1964, at 10:00 a.m. for pre-trial.

Prior to pre-trial and not later than September 7, 1964, each party to these proceedings shall submit a separate pre-trial statement to the Court. A joint pre-trial statement is preferred and may be submitted in lieu of separate statements.

All discovery in these proceedings shall be completed on or before September 7, 1964.

Each party shall submit a complete trial brief on or before September 7, 1964.

Subject to the further order of this Court, the trial date for this cause is fixed for 10:00 a.m. on September 21, 1964.

Dated: April 28, 1964.

[Signature illegible] United States District Judge.

Approved as to form: M. W. Krause, Attorney for Plaintiff, Cecil F. Poole, United States Attorney. By: /s/ Charles Elmer Collett, Assistant United States Attorney, Attorneys for Defendants.

[fol. 242] IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

ANSWERS OF DEFENDANT JOHN F. FIXA TO PLAINTIFF'S  
INTERROGATORIES—Filed June 1, 1964

Comes now the defendant John F. Fixa, Postmaster, and answers the Plaintiff's Interrogatories as follows:

1. This defendant is not able to state whether or not the referred to statement of Tyler Abell is accurate as to current practice, but refers to section 9.13 of the Customs Regulations, as added by Treasury Decision 55797, approved December 27, 1962.

2. Refer to answer no. 1.

3. A list of countries is indeterminate, dependent upon the examination of mail deposited for delivery. Generally, the countries which have been subject to screening procedures are:

Albania

Bulgaria

China (any part of which may be under Communist domination or control)

Cuba

Czechoslovakia

Danzig

East Prussia

Estonia

Germany

(The Soviet zone and the Soviet sector of Berlin)

[fol. 243] Hungary

Indochina (any part of Cambodia, Laos, or Vietnam which may be under Communist domination or control)

Korea (any part which may be under Communist domination or control)

Kurile Islands

Latvia

Lithuania



Outer Mongolia  
 Poland  
 Romania  
 Southern Sakhalia  
 Tanna Tuva  
 Union of Soviet Socialist Republics  
 Yugoslavia  
 Mexico  
 Hong Kong  
 Macao  
 Japan  
 Philippines  
 Taiwan, Formosa

4. No.  
 5. From February to December 1963 ..... 5,184,119  
 From January to February 1964 ..... 922,730

6. (a) 8.81%  
 (b) 2.52%

7. (a) Seven postal clerks and three mail handlers.  
 (b) No answer required.

8. This defendant, unless specifically directed by this Court, objects to stating the names of said personnel, on the grounds that the names of such persons are wholly irrelevant and immaterial to the alleged issues of this case.

9. No effort is made to determine if material has been ordered by subscription.

10. From February to December, 1963 ..... 17,476  
 From January to February, 1964 ..... 6,150

John F. Fixa, Postmaster.

Subscribed and sworn to before me this 28th day of May, 1964.

Harry R. Oliver, Deputy Clerk District Office the U.S.  
 Nor Dist of California.

Proof of service [omitted in printing]

[fol. 244] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

ANSWERS OF DEFENDANT GEORGE BROKAW TO PLAINTIFF'S  
INTERROGATORIES—Filed June 1, 1964

Comes now the defendant George K. Brokaw, Collector of Customs, and answers the Plaintiff's Interrogatories as follows:

1. The procedure in current practice is in accordance with the attached copy of the Bureau of Customs Instructions of January 4, 1963. This answering defendant is unable to state whether or not Mr. Tyler Abell's "generally speaking" statement referred to as attached to Plaintiff's Opposition to Motion to Dismiss is "accurate."

2. The same answer as No. 1.

3. There is no set list of countries subject to examination within the provisos of 39 U.S.C. § 4008. The examination varies from time to time with respect to different countries, depending upon the material deposited for mail deliveries.

4. No.

5. From February to December, 1963 .....	5,184,119.
January and February 1964 .....	922,730.

[fol. 245] 6. (a) 8.8%.  
(b) 2.5%.

7. (a) Unknown.

(b) Four persons.

8. This defendant notes an objection to question no. 8 on the ground that the names of the four persons employed at the San Francisco Foreign Propaganda Unit are wholly irrelevant and immaterial to any issues that may have been raised by plaintiff's complaint herein. Said names will be withheld unless specifically ordered by this Court to give their names.

9. (a) Standard procedures which obtain in respect to

the examination of all imported merchandise are employed in the examination of mail parcels.

(b) No answer required.

10. The usual training process followed in training other Customs employees is followed in the training of Foreign Propaganda Unit. No specific training material is used other than the Acts of Congress, Customs regulations and Bureau letters of instructions such as the Bureau letter of instruction of January 4, 1963, referred to above, a copy of which is attached hereto. The usual on-the-ground training given all employees in the examination of merchandise gives them training on violations of the various Customs laws and the collection of any duties due.

11. The following are twenty representative publications which were reviewed by the San Francisco screening unit and determined by New York to contain communist political propaganda:

1. Oppose U.S. Military Provocations in the Taiwan Straits Area (pamphlet) (MC)
2. Oppose the New U.S. Plots to Create "Two Chinas" (pamphlet) (MC)
3. Drive U.S. Imperialism Out of Asia! (pamphlet) (MC) [fol. 246]
4. Two Different Lines on the Question of War and Peace (pamphlet) (MC)
5. Foreign Aid and South Korea's Reality (pamphlet) (NK)
6. Support the Just Struggle of the Japanese People Against the Japan-U.S. Treaty of Military Alliance (booklet) (MC)
7. A Proposal Concerning the General Line of the International Communist Movement (pamphlet) (MC)
8. Peking Review (magazine) (MC)
9. Ta Kung Pao (newspaper) (MC)
10. Red Flag (magazine) (MC)
11. People's Daily (newspaper) (MC)
12. Korea News (magazine) (NK)
13. Wen Wei Pao (newspaper) (MC)
14. Evergreen (magazine) (MC)
15. People's War, People's Army (NV)
16. Vietnam (magazine) (NV)
17. Vietnam Advances (magazine) (NV)
18. Hsinhua Daily News Release (MC)

19. Self-Dependence and Self-Sustenance—Way to Survival (pamphlet) (NK)

20. China Pictorial (magazine) (MC)

**Abbreviation Key:**

MC—Communist China

NK—North Korea

NV—North Vietnam

/s/ George K. Brokaw, Collector of Customs

Subscribed and sworn to before me this 28th day of May, 1964.

Edward F. Hennessey, Notary Public in and for the City, and County of San Francisco, State of California.

My Commission Expires January 3, 1967.

Proof of service (omitted in printing.)

[fol. 247]

ATTACHMENT TO ANSWER

TREASURY DEPARTMENT

Bureau of Customs

Washington 25

January 4, 1963

Circular: Res-15-Pen

Official Use Only

To: Collectors of Customs

Appraisers of Merchandise (Mail Division)

Subject: Restrictions and Prohibitions: Importation of Political Propaganda in the Mails.

References: Section 9.13, Customs Regulations, as added by Treasury Decision 55797, approved December 27, 1962.

1. Purpose

This circular is to call attention to Treasury Decision 55797, copy attached, promulgating regulations under sec-

tion 305, title III of the Postal Service and Federal Employees Salary Act of 1962, Public Law 87-793, approved October 11, 1962 (39 U.S.C. 4008), relating to Communist political propaganda arriving in the mails from abroad.

## 2. Action

The special customs units which will administer the law and regulations in question have been established at the ports of Chicago, Illinois, El Paso, Texas, Los Angeles, California, Miami, Florida, New Orleans, Louisiana, New York, New York, San Francisco, California, Seattle, Washington, and Honolulu, Hawaii. All mail subject to examination under this law will be submitted to the special customs units by the Post Office Department.

## 3. Effective Date

The above-mentioned law and regulations are effective on January 7, 1963.

## 4. Superseded Material

Circular Res-15-Pen, dated April 7, 1961, is hereby superseded.

File: PEN 633.3 K, Attachment.

Philip Nichols, Jr., Commissioner of Customs.

Distribution: B12, C12, D, E.

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[fol. 248]

ATTACHMENT TO CIRCULAR

CC 633.3 R

- (T. D. 55797)

**Mail Matter, Communist Political Propaganda—Customs  
Regulations amended**

Section 9.13, Customs Regulations, relating to mail matter  
determined to be Communist political propaganda, added

**TREASURY DEPARTMENT  
Office of the Commissioner of Customs  
Washington, D. C.**

**To Collectors of Customs and Others Concerned:**

**Title 19—Customs Duties  
Chapter I—Bureau of Customs  
Part 9—Importations By Mail**

Section 305, title III of the "Postal Service and Federal Employees Salary Act of 1962", Public Law 87-793, approved October 11, 1962, added a new section 4008 to title 39 (The Postal Service), United States Code, entitled "Communist political propaganda." The section becomes effective on January 7, 1963.

Subsection (a) of section 4008 requires determinations to be made as to whether certain mail matter is "Communist political propaganda" in accordance with the definition prescribed by subsection (b) of section 4008.

Part 9 of the Customs Regulations is hereby amended, as set forth below, to add a new section 9.13 to place in collectors of customs the authority to make the foregoing [fol. 249] determinations. The new section also provides, among other things, that such determinations shall be communicated forthwith to the appropriate postmaster.

New section 9.13 shall become effective on January 7, 1963, and reads as follows:

**9.13. Communist Political Propaganda.**

(a) Collectors of customs shall make determinations required by subsection (a) of 39 U.S.C. 4008<sup>a</sup> as to whether mail matter, except sealed letters, which originates or which is printed or otherwise prepared in



a foreign country is "Communist political propaganda" within the meaning of subsection (b) of 39 U.S.C. 4008<sup>9</sup>. Such determinations shall be communicated forthwith to the appropriate postmaster.

(b) A collector of customs is authorized to make the foregoing determinations with respect to all mail matter whether it arrives in the customs collection district under his jurisdiction or in a customs collection district under the jurisdiction of any other collector of customs.

(c) Subsection (c) of 39 U.S.C. 4008<sup>9</sup> provides for the delivery of certain mail matter to specified classes of addressees without reference to whether such mail matter is "Communist political propaganda." The Post Office Department will determine which mail is in these categories. (Sec. 305, 74 Stat. 654; 39 U.S.C. 4008.)

[fol. 250] Part 9 is amended to add a footnote designated "9" reading as follows:

• (a) Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be "communist political propaganda", shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b) For the purposes of this section, the term "communist political propaganda" means political propaganda, as defined in section 1(j) of the Foreign Agents

Registration Act of 1938, as amended (22 U.S.C. 611 (j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not "communist political propaganda" addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for delivery in any country described in subsection (b). (39 U.S.C. 4008.)

[fol. 251] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

DEFENDANTS' INTERROGATORIES—Filed August 20, 1964

To the plaintiff, Leif Heilberg, and to his attorneys:

Marshall W. Krause, Staff Counsel, American Civil Liberties Union, 503 Market Street, San Francisco 94105 and Coleman Blease, Esq., 969 Miller Drive, Berkeley, California:

The defendants by their undersigned attorneys, pursuant to Rule 33 of the Federal Rules of Civil Procedure as

amended, hereby serve the following interrogatories to be answered separately and fully in writing under oath and signed by said plaintiff within 15 days after service. Two conformed copies of such answers are requested.

In order to simplify the issues and resolve as many matters of fact as possible before trial, the defendants further request that if any of these interrogatories or portions thereof cannot be answered fully, such shall be answered [fol. 252] to the extent possible with the reasons for not answering more fully.

1. What is your full name?
2. Are you known by any other name?  
Have you ever been known by any other name?
3. (a) What was your father's full name?  
(b) Where was he born?
4. (a) What was your mother's name?  
(b) Where was she born?
5. Where were you born, and on what date?
6. What schools did you attend, where, and through what grades?
7. (a) Did you attend college or university?  
(b) If so, when and where?
8. (a) In which countries have you lived?  
(b) State the dates and duration.
9. Have you been in Russia (USSR)?  
(b) If so, when and for how long?  
(c) For what reason?
10. (a) What countries have you visited?  
(b) When, and for how long?
11. (a) Of what organizations have you been a member?  
(b) When and where?
12. Of what organizations are you presently a member?
13. From which countries do you receive mail?
14. State the number of pieces of mail received from each country during the past year.
15. (a) From which countries have you solicited propaganda?  
(b) What type of material?  
(c) State the number of pieces received from each.
16. (a) By whom are you employed?  
(b) For how long?  
[fol. 253] (c) What type of work do you perform?

- (d) State your employers during the past five years and the work performed.
17. (a) Have you attended any schools or colleges in the United States?
- (b) Are you presently receiving instruction or giving instruction in any course of study?
- (c) If so, what, where, and for how long?
18. (a) What is the Universal Esperanto Association?
- (b) Are you a member?
- (c) Are you a delegate?
- (d) If so, when did you become a member, or a delegate?
- (e) What is the nature of your activity in the Association?
19. (a) What is the function of a delegate to the Universal Esperanto Association?
- (b) Are there other delegates in San Francisco?
- (c) If so, give their names and addresses.
20. (a) Does the Association receive mail of propaganda type from foreign countries?
- (b) If so, which countries?
21. Does each member also receive copies individually from each country?
22. (a) What is the purpose of the receipt of this material?
- (1) By the Association?
- (2) By you?
- (b) How is it used?
23. (a) Is the information or propaganda disseminated outside the organization?
- (b) If so, by whom, and under what circumstances?
- [fol. 254] 24. (a) Do you attempt to separate propaganda from other material?
- (b) Is the propaganda identified by you as such?
25. What utility does Communist propaganda have as to Esperanto?
26. (a) Have you ever appeared before a Congressional Committee?
- (b) If so, which Committee, and when?
27. (a) Whom do you consider was "wracked down in the mud" by a Congressional Committee?
- (b) Which Committee?
- (c) When?

28. (a) Whose name was destroyed by innuendo by a Congressional Committee?  
(b) When?  
(c) In whose opinion?

Dated: August 20, 1964.

Cecil F. Poole, United States Attorney. By: /s/  
Charles Elmer Collett, Assistant United States  
Attorney, Attorneys for Defendants.

[fol. 255] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

SUPPLEMENTAL ANSWERS TO PLAINTIFF'S INTERROGATORIES—  
Filed August 25, 1964

Comes now the defendant John F. Fixa, Postmaster, and answers Plaintiff's Interrogatory Number 8 as follows:

The names of the ten employees of the Post Office, San Francisco, California, referred to in Interrogatory Number 7 are as follows:

Postal Clerks Steve N. Jeong, Jessie Julian, Aldo Cecchi, Edwin Signoracci, Haskell Sills, George W. Yee and Gilbert Williams;

Mail Handlers Wilbert Guydon, William Niles and Richard Gilbert.

Dated: August 25, 1964.

John F. Fixa, Postmaster. By: /s/ Charles Elmer Collett, Assistant United States Attorney.

[fol. 256]

## AFFIDAVIT

I, Charles Elmer Collett, being first duly sworn, depose and say that I am an Assistant United States Attorney; that the defendant John F. Fixa is Postmaster at San Francisco, California; that the Post Office Department is an agency of the United States;

That the supplemental response to interrogatories has been made on the basis of the information provided by the office of the Postmaster defendant in San Francisco, California, and upon such information affiant subscribes to the response to said interrogatories.

/s/ Charles Elmer Collett, Assistant United States Attorney.

Subscribed and sworn to before me this 25th day of August, 1964.

Victor J. Fox, Deputy Clerk, District Court, the U.S. Nor. Dist. of California.

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[fol. 257] CERTIFICATE OF SERVICE BY MAIL. (omitted in printing.)

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[fol. 258] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

SUPPLEMENTAL ANSWERS TO PLAINTIFF'S INTERROGATORIES—  
Filed August 25, 1964

Comes now the defendant George K. Brokaw, Collector of Customs, and answers Plaintiff's Interrogatories 8, 9, and 10 as follows:



Answering Interrogatory Number 8, the names of the four persons employed at the San Francisco Foreign Propaganda Unit are as follows: W. H. H. Cheng, Supervisor; K. W. Wang, Customs Translator, Chinese language; T. Yassueda, Customs Translator, Japanese language, and J. Selby, Customs Translator, Korean language.

Answering Interrogatory Number 9, only second-class material is examined. If from the addressee, and the addressor, the nature of the contents is already known, it is not opened and read. If the material is suspected, it is opened and read. The determination as to whether or not it is propaganda material is made by the Assistant Deputy Commissioner in New York.

Answering Interrogatory Number 10, the personnel in the Foreign Propaganda Unit are employed through Civil [fol. 259] Service, and necessarily must have satisfied the job description requirements. Each employee has an individual requirement depending upon his grade. The translator, in addition to his knowledge of the language and ability to translate, is required to have a general knowledge and background in political science, law, and any specific technical knowledge which may be required to read the materials involved.

When new personnel are assigned to the Unit, their training is effected on the job, and involves the identification of various items of mail as to weight, appearance, and identifying address, either of the sender or the receiver. W. H. H. Cheng is the Supervisor of the Unit, and he supervises the training.

Dated: August 25, 1964.

George K. Brokaw, Collector of Customs. By: /s/  
Charles Elmer Collett, Assistant United States  
Attorney.

#### AFFIDAVIT

I, Charles Elmer Collett, being first duly sworn, depose and say that I am an Assistant United States Attorney; that the defendant George K. Brokaw is Collector of Customs at San Francisco, California; that the Bureau of Customs is an agency of the United States;

That the supplemental response to interrogatories has been made on the basis of information provided by the

office of the Collector of Customs, defendant, in San Francisco, California, and the office of the Assistant Deputy Commissioner of the Bureau of Custom in New York, and upon such information affiant subscribes to said responses to said interrogatories.

/s/ Charles Elmer Collett, Assistant United States Attorney.

Subscribed and sworn to before me this 25th day of August, 1964:

Victor J. Fox, Deputy Clerk, District Court, the U. S. Nor. Dist. of California.

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[fol. 260] CERTIFICATE OF SERVICE BY MAIL (omitted in printing.)

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[fol. 261] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

[fol. 262] MOTION FOR SUMMARY JUDGMENT—Filed September 14, 1964

The defendants and each of them hereby move the Court for summary judgment against the plaintiff in this cause, on the ground that there is no genuine issue of material fact remaining, and that said defendants are entitled to such judgment as a matter of law, for the reasons and upon the authorities stated below. Said motion will be made upon the records and files of this case.

### REASONS AND AUTHORITIES

The Motion for Summary Judgment is made upon the following grounds:

1. That the action is moot.
2. That there is no substantial constitutional question.
3. That Section 4008 of Title 39, United States Code, is constitutional.

[fol. 263] Dated: September 11, 1964.

Cecil F. Poole, United States Attorney. /s/ Charles  
Elmer Collett, Assistant United States Attorney,  
Attorneys for Defendants..

[fol. 264] IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

ANSWERS TO DEFENDANTS' INTERROGATORIES—Filed Septem-  
ber 14, 1964

[fol. 265]

Vienna,  
Sept. 4, 1964.

To whom it may concern:

The statements below are my answers to the "Defendants' Interrogatories" in the case of civil no. 41660, in The United States District Court for The Northern District of California, Southern Division.

1. Leif Heilberg.
2. No. No.
3. a Aksel Skjold Heilberg.  
b Helsingor, Denmark.
4. a Elsa Gunhild Frideborg Hansson.  
b Fredensborg, Denmark.
5. Copenhagen. October II. 1932. (Denmark)
13. From the most countries in the world.
14. Impossible; as no account is made of the number of

letters received, plenty of letters received unsolicited going in the waste paper basket, and much "junk mail" also received. However, a conservative estimate would put the number of letters as no less than 1000 to 2000 per year.

15. None solicited.

18. a The Universal Esperanto Association is an organization internationally coordinating the work of national and specialised Esperanto associations for the purpose of promoting The International Language.

b Yes.

c Yes.

d I became a member in 1952 and a delegate in 1954.

e As a special delegate I reply to inquiries concerning the matters I am a special delegate for. (a vague analogy would be the Commercial Attaché compared with the Consul General, the latter in U.E.A. being the general delegate)

19. a The function of a general delegate to the U.E.A. is to represent the association in the local esperantist movement, to procure members for U.E.A., and to promote the use of Esperanto locally.

b Yes.

c I cannot, as I do not have the U.E.A. manual with me in Europe. However, in the San Francisco telephone directory under the name of "Esperanto Society of S.F." is listed a number where all such information can be had.

20. I do not know what mail the association receives.

21. I do not know who receives what in their mail, but it seems most unlikely that the sources of propaganda dissemination could obtain lists with names and addresses of the members in the various countries. In the above mentioned manual appears the names and addresses of the delegates and other officials only.

22. a This question is patently phrased to give the idea that there is any purpose at all in the receipt of "this material". When question 15 has been answered with "None solicited" as could be, and as it has been done, subsequent questions should not imply a necessity for a purpose of receipt of propaganda material. When the material is not solicited, its receipt is simply the logical performance for mail sent to a person residing in a free society, without any "Big Brother" censors telling him what he can or should read.

[fol. 266] b After thumbing through the pages of any magazine that you might classify as "propaganda", I either

throw it in the waste paper basket, or I send it where people may see that The International Language is used, like the national languages, for all purposes of communication.

23. a If by "the organization" you mean U.E.A., you are right, as U.E.A. does not distribute propaganda, being neutral as regards politics.

b The distributors of what you call propaganda (and what you probably would specify better as Communist propaganda, not Capitalist propaganda I imagine) would mainly be the publishers of such literature, like in the U.S. one esperantist distributes "capitalist propaganda" seemingly published by himself. I further think that some individuals taken in by the Communist theories, and probably quite a few persons living in Communist countries, distribute the material throughout the world either for ideological reasons, or simply as a way of reimbursing western esperantists for their kindness in sending things from the Western World. The latter case is mine. One esperantist I met from the Soviet Union insisted on repaying my kindness to him by paying subscription for me to a couple of "red" esperantist magazines.

24. a A person with an average intelligence easily spots propaganda and has no need to "attempt" any separation.

b Yes, it is easily identified by me, in the form it usually appears.

25. None whatsoever, except perhaps, as above explained, that a language is nothing but a means of communication, like is English, French, German, etc., and that the fact that Esperanto is extensively used by more and more bodies, governmental as non-governmental (Voice of America, Unesco, etc.) is always welcomed by the esperantists.

I hereby declare that the above answers have been made to the best of my ability, in the way I have understood the questions posed to me.

Leif Heilberg.

B.R.Z. 658/64

Die Echtheit der Unterschrift des Herrn Leif Heilberg, Vertreter, PO BOX 62, Los Angeles, Californien 90028, derzeit in Wien 16., Degengasse 35, wird bestätigt. . . . Wien, am vierten September eintausendneunhundert. . . . sechzig. . . .

[Copy Illegible]

[fol. 267] [File endorsement omitted]

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

**Before: Honorable Homer T. Bone, Honorable Albert C.  
Wollenberg, Honorable Alfonso J. Zirpoli**

**No. 41660**

**LEIF HEILBERG, Plaintiff,**

**vs.**

**JOHN F. FIXA, ET AL., Defendants.**

**Transcript of Pretrial Conference—September 15, 1964**

[fol. 268] **APPEARANCES:**

**Plaintiff: Marshall W. Krause, Staff Counsel, American Civil Liberties Union, 503 Market Street, San Francisco, California, and Coleman Blease, Esquire, 969 Miller Avenue, Berkeley, California. By: Coleman Blease, Esquire.**

**Defendants: Cecil F. Poole, United States Attorney, 450 Golden Gate Avenue, San Francisco, California. By: Charles Elmer Collett, Assistant United States Attorney.**

[fol. 269] **PROCEEDINGS, SEPTEMBER 15, 1964, 10:00 A.M.**

**The Clerk: Heilberg versus Fixa, Pretrial Conference. Counsel, state your appearance for the record, please.**

**Mr. Blease: Coleman Blease appearing for the plaintiff.**

**Mr. Collett: Charles Elmer Collett, U. S. Attorney's Office, appearing for the defendants.**

**STATEMENT ON BEHALF OF PLAINTIFF BY MR. BLEASE AND  
COLLOQUY**

**Mr. Blease: The trial of this matter insofar as the evidence which we have to offer, Your Honors, should take a day or even less than a day. We plan to offer approximately seven witnesses, three of whom were recipients of these POD forms notifying them that they were recipients**



of mail which had been classified as Communist political propaganda, and they will testify generally they were inhibited in returning the card. We will present them for that purpose and, also, introduce the cards which they had received.

Beyond that the witnesses would be persons related to the administration of the program in San Francisco. More specifically, Mr. Brocaw, Mr. Cheng, who is the supervisor of the propaganda screening division for the Customs Bureau, and Mr. Wang, who is a Customs Translator. [fol. 270] In addition, we would like to call one postal clerk from the Post Office side of the screening unit. That would be the substance of the witnesses. The latter witnesses, of course, to describe the operation of the program in San Francisco and to testify according to those items of sequence that we have outlined in our statement of facts.

Beyond that our evidence would consist, and we would like to have the Court take judicial notice, of at least two public hearings on this matter, one of which you already have in your possession, which the U. S. presented at a prior hearing, which was the hearings conducted on the bill which resulted in Section 4008, the other document being hearings by the House, Post Office and Civil Service Committee of June 19th and 20th of last year, 1963, which contain statements by Mr. Tyler Abell of the Post Office Department and Mr. Fishman of the Customs Bureau regarding the operation of Section 4008 as of that date. We will submit prior to the trial date an index of those portions of those documents which we would like to call to the attention of the Court.

Lastly, I am in hopes that the Government will stipulate to the introduction of the record at the hearing on the motion to dismiss, along with the exhibits which were taken at that time, and the answers to the interrogatories which [fol. 271] we submitted to the defendants.

I have in preparation, also, an analysis of the legislative history of 4008 which should be ready by today or tomorrow.

Judge Zirpoli: The case in New York is before the Supreme Court, is it?

Mr. Blease: The Lamont case has now been noted for appeal.

Judge Zirpoli: Let's assume for the moment the Su-

preme Court were to say that the order of the three judge court dismissing the complaint is proper. What would you do?

Mr. Blease: We would still be in business, Your Honor.

Judge Zirpoli: Would we have the courage to continue with this proceeding if they were to dismiss that proceeding?

Mr. Blease: Well, I am sure you would have the courage but I think you would also have the wisdom. And for the following reasons . . . As I think is adequately indicated in this pretrial memorandum on the law. The Lamont case was in part based upon errors of fact, and the issues arising out of the detention of the mail were mooted in the Lamont case because the Court was under the belief, mistaken, we believe, that since Lamont had been notified by the Post Office Department that the mail would not be [fol. 272] further detained, that in fact the detention issue was then and thereby mooted.

If our version of the way in which Section 4008 operates is correct, even despite the notification by the Post Office Department, the mail, in this case, going to Mr. Heilberg, is detained in several instances, and the precise sequence of events is important here to demonstrate—

Judge Zirpoli: Where is the difference from the manner in which it was detained insofar as the man in New York is concerned, which goes to the same mechanics?

Mr. Blease: In New York the Court believed that the notification saying, we will no longer detain, ended the detention question. What we are saying is, that the Court misunderstood the way in which the system operates. In fact, there are still detentions involved even despite the notification.

Judge Zirpoli: The Supreme Court has all that. It has that method of detention before it, doesn't it, in the record of the Lamont case? They discuss it. It is part of the opinion, both the majority and the dissenting opinion.

Mr. Blease: I have looked at the pleadings in the Lamont case, and the matter was submitted for summary judgment [fol. 273], as you know, and the details of the program were simply not argued before the Court and the Court was not apprised of it and they were not raised in the pleadings.

Judge Zirpoli: Where did they get all the facts which they cite in their opinion?

Judge Wollenberg: Very definitely it goes to the constitutional question.

Mr. Blease: Of course. But I am merely mentioning one of the points.

Judge Wollenberg: And, therefore, isn't the question before the Supreme Court of the United States the very basic question here, about the constitutionality of the whole matter, the legislation? Isn't that the point which is really before the Supreme Court of the United States? It is true factually there are distinctions, and maybe errors of fact in its findings, but the opinion of the three judge court, which is now on appeal, very clearly discusses, does it not—

Judge Zirpoli: They turned basically on their conclusion that there is no controversy and, therefore, they should dismiss. If they say there is no controversy in New York . . . The thing I find some difficulty reasoning with is how can we help but find there is no controversy here?

[fol. 274] Mr. Blease: Because there is a factual finding involved. It has nothing to do with the law.

Judge Zirpoli: When the factual finding is finally boiled down, the injury is no different here than it was there.

Mr. Blease: The New York court was misapprised of the nature of the detention, and they believe that the notification from the Post Office ended the detention process. In fact, it did not, and we are willing to prove it, and part of the witnesses we put on, and the documents we have submitted, are for the precise purpose of showing that the detention goes on.

Judge Zirpoli: One of the questions which was raised was the keeping of the list.

Mr. Blease: It is a second and separate issue.

Judge Zirpoli: And wanted to have an injunction insofar as that aspect was concerned. Now, must they not of necessity pass upon the constitutionality of the statute in order to pass upon the propriety of the Court denying injunctive relief by dismissing the complaint?

Mr. Blease: With regard to that separate point. Your Honor, the Court also underwent a factual misapprehension. The Court in reviewing the questions tendered by the . . . Lamont's name being on the list . . . said that the test

here is whether or not . . . I guess there is some reasonable [fol. 275] apprehension that some injury will flow to Lamont as a result of having his name there.

Apart from this test, and accepting that test for the moment, the Court believed that the operation of 4008 was different from the operation of the statute existing prior to its being discontinued by President Kennedy on March 17, 1961. I think the Court was in error in that belief, as our legislative history will show, that the current program is really a reinstitution of the program existing prior to March 17th. Now, the Court did not go into its evidence there. It merely asserted it as a conclusion. But I do believe that the legislative history had not been briefed for the Court in the Lamont case and it was not before the Court and, therefore, they were in error in believing that the program was different and, therefore, in part the policy was different.

Judge Zirpoli: The Supreme Court can correct if what you say is true. And when they correct these errors, if these are errors . . . I am just speaking as one member of this Court . . . but I cannot help but feel that a ruling of the Supreme Court in the Lamont case will actually be dispositive of the very proceeding before us. It is hard for me to see how the Supreme Court can write an opinion in that case without at the same time touching upon and conclusively deciding upon the matters we would have to pass [fol. 276] on.

Mr. Blease: What I think is a distinct possibility in that case, Your Honor, is that the Court will look at what it has before it. I have just this week received the document from Mr. Budine, Mr. Lamont's counsel, presented to the Court, and the same errors are still present in that document and they have not corrected them.

The Court may very well, if this case is not argued differently, see fit to agree with the lower court on the procedural questions and moot the case, in which case we would be left with this case.

Judge Zirpoli: If they moot the case, they are saying that the very thing that you are complaining about is all right, that the Government can say to them, you have to comply and the minute you raise a constitutional question you do not have to comply and, therefore, it becomes moot.

Judge Wollenberg: I do not see how any court, particularly the Supreme Court, can write an opinion, publish an opinion, without facing the basic issue that is involved here, that is, the constitutionality of the entire matter. To say the Court was wrong and correct an error, change a factual error, but when they do that, then, they have to come to some disposition of the controversy and what is [fol. 277] involved here. When they do that, I think they have to face that very issue.

Mr. Blease: If the factual error goes to the question that I raised relating to the detention of the mail, then, they might very well moot the case by saying simply that Lamont was no longer involved in this case and the constitutional questions are not presented.

Judge Zirpoli: If they say that, shouldn't we be saying the same thing, that Heilberg is no longer involved and it is moot as far as he is concerned. If it is moot for Lamont, it is difficult for me to see how it cannot be moot for Heilberg.

Mr. Blease: We have a different record, Your Honor.

Judge Zirpoli: I recognize that you will make this observation, but the difference in the record is not so significant. And you corrected me when I used the word "courage" and said I should have said "wisdom." The reason I used the word "courage" was because that I didn't feel it would be quite appropriate for me to use the word "gall." I think that is what we are faced with the moot question.

Mr. Blease: Having been raised in a law school that believed that the lawyer took some active part in the legal process, came to believe that the way in which the case [fol. 278] presented to the Court and the way in which it was briefed was very important to the ultimate resolution. I hope I am not misinformed about that.

Judge Zirpoli: Mr. Blease, I shall make one observation, as one member of the Court. I compliment you as to the quality and character of the pretrial statement and trial brief which you have submitted to the Court.

Judge Wollenberg: It is excellent. It is of great assistance to the Court.

Mr. Blease: My only point is that I think the issues raised here and the constitutional framework in which these issues are being raised is quite different than it was raised in the Lamont case, and that the Court will not have that in front



of it. Now, the Court, I must admit, might decide to take it anyway. And it could, in that event, rule on these matters. However, I do feel that this case will tender the issues in a clearer light than that case and will correct errors of fact which the Court might be disposed to otherwise accept and present this case in the manner in which it will have it rendered in a proper constitutional light. Besides which, we have a different plaintiff here; his rights are at stake.

Judge Zirpoli: He is not being particularly prejudiced [fol. 279] now and any prejudice that came to him has already happened. Now, whether this Court should stay these proceedings pending the decision of the Supreme Court, because there is no further injury likely to come to your client so no prejudice will follow by awaiting the ruling of the Supreme Court.

Mr. Blease: Beyond what I have already said, if Your Honors were disposed to continue with this matter, and I believe that you should, that this case when presented to the Court in conjunction with the Lamont case will enable the Supreme Court to properly and in detail deal with this question. There are literally millions of people involved in this statute ultimately. This is an issue in which millions of pieces of mail are being detained during the year that goes to people throughout this country. It is an issue of great magnitude. And I think to deprive the Supreme Court of all of the advantages which would come to it from the mature consideration given to it, not only by the Court in New York but by the Court here, that the high court would welcome the presentation of this case along with the Lamont case.

Judge Zirpoli: I am not commenting on the latter observation.

Judge Wollenberg: Only to say that I do not think this [fol. 280] could get up there to be considered together and with that case. That is there and has been there for some time now. It must be calendared.

Mr. Blease: I do not believe it has been calendared.

Judge Wollenberg: In any event, it would not be considered together. The point, therefore, would be, in my mind, that this case could very easily follow right directly behind. It is not in any way disposing of this case. It is not in any way prejudicing the case, as far as I can see, Mr. Heilberg awaiting an opinion. Besides, any prejudice



directly on him, or these pieces of mail that you speak about, they would not be disposed of. This could come along very rapidly behind the other case.

Mr. Blease: May I briefly describe what happens to this mail because it is important.

As a result of this program, mail which would have gone to hundreds of post offices around the country are now detoured through 11 screening points. There is a great delay that is occasioned by the simple process of having now to send this to a different place than it would otherwise be sent, and this affects all of the mail which comes from these foreign countries.

Judge Zirpoli: First class?

[fol. 281] Judge Wollenberg: No.

Mr. Blease: According to the testimony, possibly even the first class mail is also delayed because there is no simple way at that point of separating that mail from amongst all the other mail.

Mr. Abell in testifying on this point in hearings in Washington, D. C. said that the mail coming from the foreign countries comes in large sacks and the sacks are not sorted out so that the first class mail or the sealed mail . . . same classes are not applied to foreign mail . . . but the sealed mail is not separated out under the postal union operation from the other mail. So they get all these large sacks which they dump out and sort when this mail is sent here so that even sealed letters, what we call first class letters, are delayed as a result of this process.

Judge Zirpoli: Well, the Post Office could do that without any legislation, couldn't it? There is nothing to prevent them from using that for all mail.

Judge Wollenberg: They still have to sort the mail.

Mr. Blease: What I am saying is that the sorting takes place at the screening place and the screening place imposes the delay because they have to send it to a separate place. What I am saying is that all the mail is delayed, at least [fol. 282] for that amount of time that is occasioned by sending it to a different place. That is not even talking about the additional delays which occur to mail other than sealed letters.

Judge Wollenberg: You mean all mail, all European mail, is delayed because of this statute?

Mr. Blease: All mail coming from at least the Communist countries are delayed as a result of this, as I understand from reading the hearings, all of the mail.

Judge Zirpoli: Would you question the right of the Post Office to do this?

Mr. Blease: Yes.

Judge Zirpoli: As a part of its own departmental work to say that the mail from the foreign countries should go to the following stations initially.

Mr. Blease: This turns upon the purpose which occasions the delay. And what I am trying to indicate here is that if you do it for a purpose which is clearly within the power of the Congress, then the question of whether the delay is constitutional or not is probably largely in their discretion.

But where the delay is occasioned because you have a statute operating, in part at least, under an unconstitutional purpose, then that delay is a direct injury to a constitutional [fol. 283] right, and permits us to raise all of these issues.

I might say that the delay is even longer than that for all that mail which is not sealed letters or exempt mail which is first sorted out from this pile of the screening unit and forwarded immediately, that all of the rest of the mail is then searched, some of it read, opened and classified as to its political content. All of the rest of the mail is. And it is only at that point do they check this list of POD forms, which is the only place where Heilberg's name is now, to determine whether or not it is to be sent on directly without further inquiry. So Heilberg's mail, and all of it coming from these countries, is delayed even that additional period of time. And where the local people are in doubt as to the classification, that mail is sent to New York City for Mr. Fishman's appraisal as to its classification, delayed even further. So there is the possibility that Mr. Heilberg's mail is delayed weeks, maybe months, as a result of this process, even though his name has been placed in these card files of POD forms. That is one of the things that we will demonstrate at the trial.

As a matter of fact, if you think about the operation of the program, it would be difficult to conceive of them doing [fol. 284] it any other way than handling it this way. I think this is the most efficient way of handling it, given the program, but the program is what engenders all of this

delay and, literally, the whole mail system involving mail from these countries has been impaired as a result of this statute. And Mr. Abell was rather frank about that in connection with these hearings.

Judge Zirpoli: Where is Mr. Heilberg now?

Mr. Blease: Mr. Heilberg is in Europe.

Judge Zirpoli: Is he coming back to the United States?

Mr. Blease: He has so informed us he is, yes. In December.

Judge Bone: What is happening to his mail during his absence?

Mr. Blease: I do not know.

Judge Bone: It might be piling up at his home.

Mr. Blease: I do not know whether he has followed the procedure of having it forwarded or not.

Judge Bone: You have made no inquiry?

Mr. Blease: It was very hard to reach Mr. Heilberg to get the answers to the interrogatories. He is apparently all over the country.

Judge Zirpoli: The answers to the interrogatories were [fol. 285] answered presumably in Vienna.

Mr. Blease: Yes. We had originally a French address and we sent them there and ultimately it was forwarded to him.

Judge Zirpoli: Isn't this a further indication that no particular harm would come by awaiting the ruling of the Supreme Court?

Mr. Blease: As I tried to indicate, and I think the constitutional law permits Heilberg to raise issues not only which are personal to him but also to raise issues involving the rights of third parties.

Judge Zirpoli: The Supreme Court is going to rule on that on this motion to dismiss. They cannot help but rule on that question. That is raised in the Lamont case.

Mr. Blease: Your Honor, if I may venture this one observation: That the law in this area is not terribly clear, and most all the cases . . . in fact, I can think of no exception . . . have only permitted the raising of the rights of third parties after they had demonstrated a right involving themselves has been tendered so you cannot raise the rights of third parties without at some point yourself having your own personal right involved.

So if they moot the case with respect to the detention [fol. 286] issue for Lamont and rule adversely against him on the listing requirement, then he cannot raise the issues of third parties because he has not met the primary threshold requirement.

Judge Zirpoli: If they rule in the fashion you have just indicated, I do not see how this Court can help but rule the same way for Heilberg.

Mr. Blease: That goes back to your—

Judge Zirpoli: That goes back to my other question and, therefore, all of the issues that are being presented here appear to me to be before the Supreme Court right now.

Judge Wollenberg: The basic issues have to be. I do not see how they could do otherwise. They have it in a case in which there is a very well and lucidly expressed dissenting opinion. It discusses those issues. They are going to have to meet this. I would be greatly shocked if they would not meet the very issues we are concerned with here. In any event, this case would be so close behind it since it is now being processed through . . . I do not know exactly what stage it is.

Mr. Blease: If we were to put this the other way, the case now has already occupied a considerable amount of time of Your Honors. One more day of hearing, at best, is involved. The matter at that time will be submitted. [fol. 287] Judge Zirpoli: But there is more than one day of hearing involved. There is the serious responsibility of writing an opinion which may take several days of time, and exchanges between the judges in a pretty busy court. And we ought to be trying some of these other cases.

Judge Wollenberg: Let me say that I think your statement, the legal portion, and the points in your trial brief, are beautifully presented. You cite all the cases that apparently are available. You have followed pretty much Mr. Katzenbach's presentation as set forth when he opposed the passage of this legislation before the committee. And I am sure this is the very basis, these cases and this determination, upon which the Supreme Court must rule.

Judge Zirpoli: I have a great regard for Mr. Blease and I am pleased with the quality and the nature of the statement and brief that he presented.

Judge Wollenberg: Yes.

Judge Zirpoli: But I cannot agree with him that there is a real marked difference in the cases.

Mr. Blease: May I suggest one other point of distinction, since no testimony was taken in the New York case, no testimony was taken with respect to the impact of this— [fol. 288] Judge Zirpoli: Do you think testimony need be taken?

Mr. Blease: Well, if you follow the reasoning of Justice Black in the Talley case, he did not feel the need of any evidence whatever with respect to the disclosure provisions involved.

Judge Zirpoli: If the Supreme Court follows the reasoning in your brief, the reasoning of Mr. Katzenbach or the Department of Justice, they do not need any either, do they.

Judge Wollenberg: Mr. Katzenbach's presentation before that Committee was clearly without any factual evidence but just the basic things required by that statute alone.

Mr. Blease: Just to reiterate. I think the factual presentation here is different. We will have those facts available for the Court, the legal authority and structure of it is different, and the Court would have that before it as an aid to its decision.

Judge Zirpoli: What you will have before us in the way of additional factual situation are facts which go to confirm the ultimate facts that are already conceded by the Government. That is what it amounts to.

Mr. Blease: No. As a matter of fact, the Government [fol. 289] argued in the Lamont case that the detention had ended with the notification to Lamont that nothing further would happen to his mail and it would be sent on to him. Now, that was simply an error if you view the operation of the statute as we have here depicted it. That was the Government's position.

Judge Zirpoli: The error, such as it is, is something presumably as to which the Court has judicial notice because the reports before the Committee will contain the information to correct any such error.

Mr. Blease: If the Court is willing at the Supreme Court level to take judicial notice of these documents, then it could correct that, that is true.



Judge Zirpoli: You could say the District Court could take judicial notice of it and we, therefore, notice that which the District Court could have judicially noticed.

Mr. Blease: Yes, the Supreme Court could take that tact. It could resolve the issues, I am not denying that for a moment.

However, these raise issues of tremendous consequence in this country, and I think to have before the Supreme Court all of the advantage and the wisdom of the various judges who have considered this matter and taken the evidence and thought about it, and their considered opinion [fol. 290] would be of enormous help to the Court and that, therefore, I think you would be performing the highest judicial duty if you were to proceed with this matter and submit to the Court your determination of the constitutional issue involved here and the facts. I would think that would be wholly in keeping with the responsibilities—

Judge Wollenberg: I think we should, before proceeding to determine what our feeling is and what we are going to do in this regard, confer on it and respond to counsel on both sides.

Judge Zirpoli: I think before we hold a conference, let's see if Mr. Blease has any other thoughts as to why we should proceed—

Judge Wollenberg: Yes.

Judge Zirpoli: Assuming the case is going forward to the Supreme Court.

Are there any other reasons that you have in mind as to why we should proceed with this case other than those you have expressed?

Mr. Blease: I cannot think of any at this moment. If you would, give me five minutes.

Judge Zirpoli: Let's hear from Mr. Collett.

Do you have any thoughts to express, Mr. Collett?

#### STATEMENT ON BEHALF OF DEFENDANTS BY MR. COLLETT AND COLLOQUY

Mr. Collett: If the Court please, I think Your Honors have indicated that the problem here with regard [fol. 291] to Mr. Heilberg, as I know from the answers to the interrogatories . . . he did not answer them all. But there is no problem of any particular damage to him.



Judge Wollenberg: He did not have to answer all of them. I told him that.

Mr. Collett: That is right. But he had to answer 16 and 17, which he did not answer. The ones he did not have to answer by your order he did not, but he did not answer 16 and 17. But essentially it is all in the same pattern anyway.

But he has been getting all of the mail. And the matter of detention or delay does not seem to me to raise a question that is of any novelty.

I was rather interested in the statement that he makes with regard to 22 where he says:

"When the material is not solicited, its receipt is simply the logical performance for mail sent to a person residing in a free society, without any 'Big Brother' censors telling him what he can or should read."

Well, the whole complaint here is framed with regard to the unconstitutionality of 4008. All of this other matter, to my mind, goes off as to the manner in which the statute which has been enacted by Congress is [fol. 292] implemented by the Executive Department as it endeavors to perform what Congress has required it to perform by the statute.

We are way off on matters pertaining to mail handlers and people who are personnel in the Customs Department and in the Post Office and talking about points at which the mail may be first screened. But as far as Mr. Heilberg is concerned, all this is immaterial. He does not show anything in the way of any specific damage to himself, nor can he show any. This is an endeavor to try to reach at the entire statute. And as I think you well pointed out, the Supreme Court, if it has it before it now in the Lamont case, all these things are going to be considered, as you well know. When the Supreme Court gets a question of this kind, it will certainly require the presentation of everything that is in the legislative history and all the statements that have been made before the Committee.

So it seems to me that this Court is going to be required to labor through all of the work of repeating what has already been done in the Lamont case.

Also, the Amlin case was down in Los Angeles. That case was dismissed. Also, the McReynolds case in New York, in which there has been a motion for summary judgment by the plaintiff, was denied, and the motion to [fol. 293] dismiss, and it raises all the same type of questions likewise. I do not know whether there has been an appeal to the Second Circuit in that case.

But it seems to me that this case is one that should await the decision of the Supreme Court and if there is anything to go forward on, let's go forward on it.

But, certainly, appearing here on behalf of the defendants, there is the Congressional record, and what Mr. Abell has said. There's nothing to hide that I know of. The matter is quite clear as to what has been said. And why should this Court repeat the work which will undoubtedly be presented to the Supreme Court.

I do not know whether you want to ask me anything, but to the extent of the brief . . . Mr. Blease, I have talked to him personally, and I think he is sincerely endeavoring to pursue what has been a question of his authority, has been after it for some considerable time and he has certainly presented a brief to the Court which I hope and trust is as ably presented to the Supreme Court by other counsel. I am sure it will be.

The extent to which these cases and quotations taken from them raise matters that may be issues of serious import, I don't know. I fail to see where there is any great serious question as to Mr. Heilberg. I do [fol. 294] not see any irreparable damage.

I think the only thing he has challenged is the constitutionality of the section, and I think that is specifically what is here.

To expand that, to go into something in the nature of a Parker V. Lester type of case, which is not even alleged in the complaint, that the manner in which the Executive Department implemented the statute by promulgating regulations which are contended to be unconstitutional, then you have not an issue of the constitutionality of the original statute but the manner in which it is being executed or the Executive Department is administering it. I do not see that it is here. And it has been the reason that I felt objections to the materiality of the interrogatories that

were proposed was a good objection; that it is going far afield of the issue which is actually presented by the complaint, and that is, is the statute constitutional.

It would be my motion that the matter be continued or stayed, the proceeding here be stayed until the Supreme Court renders its decision in the Lamont case.

Judge Zirpoli: Mr. Blease, do you want to add anything now?

FURTHER STATEMENT ON BEHALF OF PLAINTIFF BY MR. BLEASE AND COLLOQUY

Mr. Blease: Well, I would only correct one point with [fol. 295] respect to the issues tendered here. I gather that a part of Mr. Collett's argument is that we have not raised the issues surrounding the administration of the Act as distinguished from the attack on the statute on its face. I think that is incorrect.

The pleadings are to be deemed amended to conform to the testimony and to the facts which have occurred subsequent to it, including facts which occurred as a result of the United States Government's acts including placing Mr. Heilberg's name on this list, and notification and other issues which have been raised and all the other issues.

Judge Bone: Mr. Blease, how would Mr. Heilberg undertake to prove that there are millions of people included. I used to work in the mail service as a boy. I am curious. How would a man undertake that almost inhuman task of proving that, bringing in all of these parties who assume to exist. How would he prove it? Is he trifling with the Court, or what?

Mr. Blease: We have statistics showing the number of people who did not respond to the POD forms.

Judge Bone: You mean you are relying on some statistics?

Mr. Blease: That is the first part of it. The second part of it, we would put witnesses on showing that at least [fol. 296] one of the reasons for not returning the form is that the people are frightened, and you can draw the inference from that that the other people are in the same situation.

Judge Bone: Those are assumptions presented in some form of evidence in which the Court reaches certain conclusions. It is not our task to type the method of and the reasons for their conclusions. They state them plainly enough. I have yet to challenge the Court's reasons in achieving certain conclusions. At least, it is a task I would not undertake.

Mr. Blease: I think certain inferences can be drawn from this evidence, and the testimony we would present, and I think it is a proper and permissible inference to draw.

Furthermore, Mr. Abell in the hearings has testified he received hundreds of letters from irate people regarding these forms and the program. So there are various ways in which we would raise in an attempt to prove that.

Judge Bone: Do you propose to introduce those letters?

Mr. Blease: No. Merely Mr. Abell's statements in that regard.

Judge Bone: Just what would we have before us in the form of evidence?

[fol. 297] Mr. Blease: You would have Mr. Abell's statements in regard to what he received.

Judge Bone: Accept that as substantive evidence of some sort.

Mr. Blease: Yes.

Judge Bone: You do.

Mr. Blease: Yes.

Judge Bone: You would ask me to believe that there are hundreds and hundreds of letters, none of which would be in evidence?

Mr. Blease: Yes.

Judge Wollenberg: You see, he is offering the testimony of Mr. Abell who is an official of the Post Office Department in charge of this program.

Judge Bone: I thought you were referring to Mr. Heilberg.

Judge Wollenberg: Mr. Abell testified before the Committee, and his statistics referred to are statistics that came from the Post Office Department and which were presented to the Senate Committee. Those are the statistics.

Is it those are the statistics?

Mr. Bleasé: Yes.

Judge Bone: Have any of them, aside from Mr. Heilberg, appeared in this case or sought to intrude [fol. 298] themselves into the case?

Mr. Bleasé: We would offer the testimony of other people who had received—

Judge Bone: I know. But some parties in this action.

Mr. Bleasé: No, we are not joining any parties, Your Honor. We have argued that in certain circumstances it is permissible for Mr. Heilberg to raise the rights of third parties.

Judge Bone: Do you argue that he has the right, constitutional right, or otherwise to interpose millions of people here and make them in fact parties in an action like this?

Mr. Bleasé: Yes.

Judge Bone: You do.

Mr. Bleasé: Yes. I think it is an established constitutional law.

Judge Bone: You can include a great army of people who sit in the background and who refuse to take an active part.

Mr. Bleasé: I think there is a good reason for the Court doing this, and I think it is a reason that the Court might undertake to accept here as an additional reason for proceeding with this matter. These cases are mostly confined to cases involving First Amendment free [fol. 299] speech questions.

The reason that the Court has on numerous occasions permitted a party to an action to raise the rights of third parties is because of the crucial nature of the rights that are involved, and because in many of these instances the rights of these other people would simply never be raised or adjudicated apart from the Court's recognition of them in the case at hand. I think this is the kind of case which presents this kind of an issue.

Judge Bone: This is the first time that millions of people have been involved?

Mr. Bleasé: No.

Judge Bone: What other case that you can name where millions of people have been involved. You have used that term, "millions of people." Do you take it from the testimony of Mr. Abell?



Judge Zirpoli: I do not think he meant that millions of people are involved in litigation. I think he meant that millions might be affected.

Mr. Blease: Yes.

Judge Bone: That is what I am getting at, that they are affected to their disadvantage. Legally, constitutionally. That is plain enough, isn't it?

Mr. Blease: Yes.

[fol. 300] Judge Wollenberg: That is the inference they draw from Mr. Abell's testimony of the Post Office Department.

Judge Bone: I understand.

And upon this inference you want us to act and to lay down a firm ruling.

Mr. Blease: Upon this reason among many others.

Judge Bone: I would like to know what I am voting for in case a ruling is to be made.

Mr. Blease: The reason that the Court has taken this tact is that this is a fundamental tenant of our democratic society, embodied in an amendment to the United States constitution. They have expressed this in a variety of ways.

In fact, the whole panoply of legal theories, part of which are set forth in the legal memorandum are all various devices, ways, by which the Court has sought to minimize the impact of actions by the government upon freedom of speech and the recognition that in a complex society like ours that it is very easy to impede the free flow of information.

As a matter of fact, I can think of no other First Amendment case which has posed an interference of the magnitude of this case because of the numbers of people involved.

[fol. 301] Judge Bone: I cannot see why, in logic, wisdom and practice, you should not take this case to the Supreme Court as soon as you can get it there. I would like to expedite it as much as possible as one member of this Court.

Mr. Blease: Thank you.

Judge Bone: I would like to test out your theories in the Supreme Court. I would like to see just how far that Court might go in sustaining your views. That is my



private opinion. I am not expressing any opinion for my brethren. I am a member of another type of court.

Mr. Blease: I hope you will prevail upon the other judges.

Judge Bone: I do not know whether or not I can. I have known these gentlemen for a good many years, and I admire them very much. They have a right to their views, as any independent judge does on the court. You probably have evidence of that. They are not at all backward about asserting themselves.

Mr. Blease: If the Supreme Court should rule adversely in the Lamont case then we would have a delay of perhaps months during which time this program would continue.

Judge Bone: Since this presents a great crisis, [fol. 302] which you say it does, where millions of people's rights under the first amendment are involved, you as a patriotic American should be burning with zeal to get it into the Supreme Court.

Mr. Blease: Yes.

Judge Bone: Do you feel that way as a patriotic American?

Mr. Blease: Yes.

Judge Bone: That is right. I share your views. In fact, I would assist you in any way. I knew how to get it to that Court through this expediting court.

Judge Wollenberg: Gentlemen, shall we confer?

Judge Zirpoli: We might take a recess at this time.

All right. The Court will take a recess at this time.

(Short recess.)

#### COLLOQUY BETWEEN COURT AND COUNSEL

Judge Zirpoli: Considering the posture of the case and the assurances of counsel that the evidence in the trial will be brief, the Court will proceed to have a trial of this cause. It may be that you will have to change the date because of pending trials.

What date do you suggest, Mr. Clerk?

The Clerk: September 25th, Friday. A week from this coming Friday.

[fol. 303] Judge Wollenberg: This is on the basis that it can be disposed of in one day.

Judge Zirpoli: We have your assurance, Mr. Blease, that the evidence should not take much more than half a day.

Mr. Blease: A day at the most.

Mr. Collett: If the Court please, I am not contemplating . . . What Mr. Abell has said, the Congressional Record is there, what more is there to say. You are giving him the opportunity. The one thing I would like the Court to do is to state something as to what framework any evidence is to be presented.

Judge Zirpoli: Mr. Blease, certainly the Court does not want you to give us what constitutes cumulative evidence. There is no need to present to this court something that is cumulative of some basic facts that may even be already stipulated to by the Government. So if you have that problem in mind, it can be terminated in one day.

(Conference among Court and Clerk.)

Judge Zirpoli: September 24th will be the trial date.

The Court should be furnished with a copy of the text of the hearing of June 19th and 20th, 1963 as soon as possible.

[fol. 304] Judge Wollenberg: Judge Zirpoli has warned about cumulative evidence. I think there is no problem about taking judicial notice of these Congressional hearings. I do not see how that could be avoided. Therefore, I do not think we need evidence that is simply corroborative of the statements made before the Committee.

Mr. Collett: I certainly do not see that I could be in any position of in any way controverting or say anything other than what appears in that record.

When I state that I think the Court should require Mr. Blease to essentially . . . that it be clear as to what evidence is to be introduced here.

Judge Wollenberg: Do you want to make a statement on that?

Mr. Collett: We have a specific case. Mr. Heilberg, on the complaint, the answers to the interrogatories, the testimony that was in the previous record, which is certainly before this Court. And if Mr. Blease feels that has to be introduced here, I would stipulate that what is now in

the record is a part of the record, which I think it is, certainly, already.

The interrogatories directed to Mr. Heilberg, I think that they are revealing to some extent as far as he personally is concerned.

I might point out that I would object to the [fol. 305] introduction of evidence at the time that it is introduced that goes beyond the issue that is framed by the complaint.

Now, if this Court is going to go on to the extent, as indicated by Mr. Blease, of bringing Mr. Wang in, who is a Customs employee, and bringing in mail handlers and so on, I am going to object to it. I do not think it has any materiality before this Court and I do not know whether this Court wants to hear that or, actually, what he expects to prove by it.

Maybe if he would make a direct statement to us now as to what he expects to prove by the individuals he has indicated to produce here, perhaps there is nothing that can be really controverted. They do what they do there and the implementation of the statute in accordance with the Customs regulations and the postal department. The instructions and so on, is something that we are not in any position to controvert. They do it the way they do it. It cannot be concealed. And whether that constitutes the basis for any further consideration by this Court, I do not know.

Judge Zirpoli: Your suggestion in effect is that you might be able to submit the case on the present record.

Mr. Collett: I think so, Your Honor. I do not [fol. 306] know whether there is anything more to be actually produced here before this Court.

Judge Zirpoli: Do you think there is any necessity of producing additional evidence?

Mr. Blease: Not if a few matters can be settled, one of which relates to the testimony which we had planned to offer, that people in fact had received these cards, that they had not returned them, and that they had not returned them because they feared that some consequences might flow having this card in the possession of the Government. I have three witnesses to put on relating to that merely to indicate that there are a number of people in this category.

Mr. Collett: Well, he says "this category," and he uses the word "fear." I do not know to what extent we are going to go into the matter of fear. Mr. Heilberg alleges fear. Taking his interrogatories, I do not see any basis . . .

Judge Wollenberg: He has already testified as to what he fears. Mr. Heilberg has been on the stand.

Mr. Collett: That is right.

Judge Wollenberg: What is added to this case by showing that three other people have similar feelings.

Mr. Blease: One, it will indicate that Mr. Heilberg's fears [fol. 307] are shared. Now, whether or not the fears are justified is another question. But to indicate that they are shared, that other people do feel the same way, and judging from that you can draw the inference that there are a substantial number of people in this position.

Judge Wollenberg: I think by the testimony before the Committee we know that there must be a substantial number of people who have received postal cards and who respond and who do not respond.

We have Mr. Heilberg's testimony of his civic feelings in the matter as far as fear is concerned.

How are you going to have any more to go to the Court?

Mr. Blease: If Your Honors feel the inferences are as good in the present record as it would be . . .

Judge Zirpoli: This is the decision that you make. We might feel that way, we may not. But you make the decision.

Mr. Blease: The purpose of putting on a postal handler is to, among other things, determine the extent of the delay, that is, how long, to get some feeling of the magnitude of the delay that is occasioned by the process as described. Beyond that, it probably would be mostly corroborative in San Francisco. And to show the same circumstances existed on the date of the hearings.

[fol. 308] Judge Zirpoli: Didn't you make the observation that in the statement of Mr. Abell it shows the delay?

Mr. Blease: Yes.

Judge Zirpoli: If your position is correct, as a matter of law isn't that delay adequate in itself?

Mr. Blease: I think it would.

Judge Zirpoli: Do you think you would need additional proof?

Judge Wollenberg: You are going beyond your basic claim here as far as the unconstitutionality of this section on its face showing its operation. Its operation, that is on the basis that it starts out on unconstitutional grounds.

Mr. Blease: That it is unconstitutional on its face and as applied.

Judge Wollenberg: Yes.

Judge Zirpoli: If the Court finds it is unconstitutional on its face, you need not look further.

Mr. Blease: That is right.

Lastly, we want to demonstrate that in the classification process, one, they classify certain publications, periodical publications, newspapers, and others, as Communist political propaganda, and that thereafter with respect to these publications all future items of that publication are classified without further inquiry.

Judge Wollenberg: Isn't that in the Congressional hearing?

Judge Zirpoli: That is in Mr. Abell's testimony, isn't it? Doesn't he make a reference to publications?

Mr. Blease: They have listed these publications without indicating dates.

If you are willing to stipulate that that is the case, there would be no need to demonstrate that.

For example, the Peking Review. Every issue of the Peking Review is classified as Communist political propaganda without regard to what is contained in any specific issue.

Mr. Collett: Well, at the moment I do not know whether that is actually so. But I do not think that issue has been framed before this Court.

Judge Zirpoli: Let's put it down for September the 24th at 10:00 a.m. It is obvious to counsel that it is not necessary to take more than one day on both sides to make this record.

Mr. Blease: We will make a determined effort to see if all of it can be settled prior to that time.

Judge Wollenberg: Yes, see if you can. You can advise one of us and we will mark it submitted.

Mr. Collett: Your Honors, the constitutionality [fol. 310] of the section is one thing. And if, then, you are branching off to whether or not the manner in which



that statute is actually administered is by means that are unconstitutional, you are off completely in another field, and that was not the case that was presented here by the original complaint that was filed. The complaint clearly challenges the statute of being unconstitutional. I do not see how you are going to get into the matter of the extent to which individuals have been, say, trained, or the Civil Service Commission has upon a job description appointed certain people with certain language background, and the extent to which when mail comes in, and there is a question about it, that it may be referred to Mr. Fishman, who was the general counsel, for ultimate determination, as to whether this piece of literature, magazine so on, is to be characterized as a Communist propaganda in the opinion of this Court, that is a matter that has been relegated to the administrative for determination.

Mr. Blease: The issues tendered by the complaint, whatever that complaint says, and I think it can be read as saying that we are challenging the statute on its face and as applied. We did raise one factual issue with regard to the working process, which is the method of applications, [fol. 311] in the pleadings. But beyond that there have been events subsequent to the original pleadings, part of which were as a result of action by the Government.

Judge Zirpoli: That only goes to the question of whether we have a controversy.

Mr. Blease: That is right. But the pleadings that have been framed in this case constitute the original pleadings plus these additional matters that occurred subsequently.

Judge Zirpoli: If this Court were to say contrary to the views expressed in the Lamont case the Court feels that under the circumstances existing here we have a genuine controversy and we will now look at the statute to determine whether in our view the statute is unconstitutional. If we find it constitutional, that ends the matter. If we find it unconstitutional, then, some question might arise as to whether we should be obligated to look into the question of the application of the statute. If we feel the evidence is insufficient for such purposes, there is no reason why we cannot ask for further hearing.

Mr. Collett: That is a fairly clear statement, Your Honor. Of course, if you were looking at it from the origi-



nal posture of the case, the case would set forth the statute [fol. 312] and then would make the necessary allegations which constitute the charge that the administration of it is in an unconstitutional manner.

The Parker versus Lester case was probably, I think, a clear example of that particular approach to it.

Judge Zirpoli: We do have to decide whether there is a controversy because you have raised that.

Mr. Collett: Of course you do. That matter is still there. That matter is still there, as to whether there is a controversy. If you say that there is a controversy, then, the next question is whether the statute is constitutional. But this enlarges, expands, and my objections, in the first instance, to the materiality of the interrogatories which were proposed was on that ground, that the issue before this Court is, first, whether or not there is a controversy, a substantial question and, then, is the statute constitutional.

Judge Zirpoli: The only thing is, you are asking the Court to determine on discovery, what was proper discovery, a situation which relates to the actual admission of that which was discovered. There is a difference between discovery and admission into evidence.

Mr. Collett: Certainly. I will recognize that this is a matter of the judicial determination.

Judge Zirpoli: Very well, we will continue the [fol. 313] matter until September 24th at 10:00 a.m. for trial or submission.

Mr. Blease: Thank you.

Mr. Collett: Thank you.

[fol. 314] IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Before: Hon. Homer T. Bone, Judge, Hon. Albert C.  
Wollenberg, Judge, Hon. Alfonso J. Zirpoli, Judge.

No. 41,660

LEIF HEILBERG, Plaintiff,

vs.

JOHN F. FIXA, et al., Defendants.

Transcript of Hearing—September 24, 1964

APPEARANCES:

For the Plaintiff: Coleman Blease, Esq.

For the Defendants: Cecil F. Poole, Esq., United States  
Attorney. By: C. Elmer Collett, Esq., Assistant U. S.  
Attorney.

[fol. 315] The Clerk: Heilberg versus Fixa. Counsel,  
state your appearances for the record, please.

Mr. Collett: Elmer Collett, of the U. S. Attorney's Office,  
for the defendant.

Mr. Blease: Coleman Blease for the plaintiff.

COLLOQUY BETWEEN COURT AND COUNSEL.

Judge Zirpoli: All right. As I understand it, gentlemen, all the evidence that is to be presented to the court is now before it?

Mr. Blease: Yes, that's correct.

Judge Zirpoli: All right.

Mr. Collett: That includes the answers to the interrogatories of the plaintiff. The only thing with regard to the evidence that I think I probably should state at this moment, which was made before, is that with regard to the interrogatories directed to the defendants Browkaw and Fixa, that the objection as to their materiality is in the record.

Judge Zirpoli: Yes.

Mr. Collett: That they are immaterial, that the issue framed here is the constitutionality of the statute, and that if it's assumed that the statute is constitutional, then matters which might pertain to whether or not the means in which the Executive Department implements the statute by executing it in an unconstitutional manner is not; that [fol. 316] it's the constitutionality of the statute which is before this court. So let the record show that that objection is there.

Incidentally, as far as the answers—

Judge Zirpoli: I mean, that is your position.

Mr. Collett: Yes, that's right. But I want the record to show—

Judge Zirpoli: The constitutionality and the application is left before the court.

Mr. Collett: Yes. I want the record to show that the objection is made, that the record is not devoid of some objection having been made to the materiality on that ground. The other thing is that there were objections to Heilberg's responses or to the interrogatories which were propounded to the plaintiff on the ground of materiality, likewise. Now, that was not ruled upon by a three-judge court. He didn't answer all the interrogatories that were there, but at the moment I don't see any particular point in making any issue of that before this court, although I think perhaps the answers to one of those interrogatories might have been of some interest to the court. The amount, the number of pieces of mail which he has received, and from how many countries, and also what his educational background might have been, it seems to me, is within the contentions that have been made here, is within, some [fol. 317] what, the framework, and has some materiality. But other than that, I think that unless Mr. Blease has more to present, although he has served this morning a memorandum on the evidence, what we will request is adequate time in order to respond and see that the matter is fully briefed as far as the court so desires.

Judge Zirpoli: How much time do you want, Mr. Collett?

Mr. Collett: Well, perhaps Mr. Blease—I think—is going to file further memorandum. Are you?

Mr. Blease: Not unless the court has any questions regarding any specific matters.

Judge Wollenberg: Are you filing a new memo this morning? Maybe you had better let that be done first and then find out about the answers.

Judge Bone: Ask if this is the memorandum.

The Clerk: I think this is counsel's memorandum on the evidence. Is that right?

Mr. Blease: Yes, that's right.

Judge Bone: All right.

Judge Wollenberg: The date is September 24th. That's it.

Judge Bone: Oh, yes, I see. There are duplicates.

Mr. Collett: Well, then, I understand that on your pre-trial statement and brief and your memorandum on the legislative history and this memorandum on the [fol. 318] evidence, this constitutes fully your opening presentation?

Mr. Blease: That's right.

Mr. Collett: Very well. Well, then—

Mr. Blease: Unless there are any questions which the court would want to have specifically briefed. Then this would constitute . . .

Judge Bone: There is one thing. The inordinate curiosity which plagues me all the time assails me now. I assume that you and our Brother Collett would probably be convinced, regardless of how this case might go, that you folks wanted it in the Supreme Court for a decision?

Mr. Blease: Yes.

Judge Bone: Would that be a fair assumption, Mr. Collett?

Mr. Collett: Well, certainly Mr. Blease has very definitely committed himself that way.

Judge Bone: At least your office wouldn't be plagued with this issue.

Mr. Collett: As was indicated the last time the court was listening to the matter, there is no question that the Corliss Lamonte case is in the Supreme Court, and as far as I can see, whatever issues are raised in this case are in that case, and the matter is before the Supreme Court. So that—

[fol. 319] Judge Bone: You know, we have to guess at

what the Supreme Court might do. But I assume that you folks wouldn't want this thing to stop at this point, in any event.

Mr. Collett: I would assume that if there was a decision in this case adverse to the defendants, that the Solicitor would probably authorize an appeal. I say that—

Judge Bone: Well, Mr. Blease at least would want to have this thing settled one way or the other for his client. You don't want to be left dangling in mid-air like Mohammed's—

Mr. Blease: That's right, Your Honor.

Judge Bone: You want this thing cleaned up. I am using vulgarisms now, but then you gentlemen will all understand it. We are all in the same business.

Mr. Blease: There is one minor item that might be just briefly cleared up. In one of the allegations of fact surrounding the means by which Mr. Heilberg's name was placed upon the list, we have drawn the inference, based upon the card that we submitted that was missent to Mr. Heilberg, it was originally addressed to the post office in New York and we have inferred from that that that was the method which the Post Office Department used by way of carrying out their letter directed to him saying [fol. 320] that his mail—

Judge Zirpoli: Well, Mr. Collett has never disputed that, anyway.

Mr. Blease: No.

Mr. Collett: I don't think there has been any variance as far as the sending out of that card, in any case, the New York case or here. Again it's stated the same procedure was resorted to in those other cases. The letters went from the Postal Department to the individual; that is, mail would be sent to him on the basis of his having filed the complaint. The only thing, to again state what I think is clearly in the record, is that when the complaint was filed I read the statute and I read the complaint, and the statute said that if the individual was determined to and desired to receive it, why, he should receive it. The complaint alleged that he desired to receive it, so I gave it to him. So on the basis of that, it seems to me to be a rather simple process as far as what the statute held.

Now, the contention here as to the constitutionality of



the statute, I mean that's something else again. But as far as the taking the wording of it, I didn't feel that it was necessary to get into any elaborate, esoteric conversation on what the word we desire might be. If he desired to receive it, he got it, period. Now, why, if [fol. 321] that is not proper, this court can determine that. But that was the simplicity in which I viewed it, and apparently the Postal Department, on the basis of the filing of the complaint that the individual desired it—they considered that the same way. In the Los Angeles case and the two New York cases, he was given the mail and the card was apparently filed and he received each of the—each of the individuals received the mail thereafter. So I don't see any question about if they missent it in the first place, why, it was sent again. But I don't know if there is any factual issue with regard to that.

Furthermore, I don't think that that's necessarily the issue that's before the court. I again refer that I think that goes to the manner in which the statute is implemented and whether or not it is implemented in an unconstitutional manner—that's something else again—assuming that the statute is constitutional. If it's constitutional, it's incumbent upon the Executive Department, the Post Office and the Treasury Department to execute it, as the Executive Department has to execute all statutes.

Judge Bone: Would you be willing to agree that you folks have a record here that ought to enable the Supreme Court to decide things like that?

[fol. 322] Mr. Blease: Yes.

Mr. Collett: Well, Mr. Blease says so. As far as I can see, everything that should be here—

Judge Bone: Well, if you want to go to the Supreme Court, I imagine my young brother here is agile enough to get that point before the court.

Mr. Collett: I think probably so.

Judge Bone: The statute on its face, whether it's unconstitutional.

Mr. Collett: It seems to me so. I mean, the record of the hearings is there. You have got that before you. The additional record of last year is there; there's no question that the Customs, the Treasury Department and the Post Office proceeded to endeavor to implement the execution of



the statute, and the answers to the interrogatories, by each of them, are there, although, as I say, for the record, the materiality of those—the answers to the interrogatories and the interrogatories—is challenged on the grounds as to what actually is before the court. It's the constitutionality of the section which I believe is the issue which is apparently, or has been, an issue with the attorneys representing the plaintiff in this case for some time, and they have been seeking to get at this particular type of [fol. 323] statute, and he has made a number of references to a work on censorship, Paul and Schwartz there, which I haven't read, but apparently you can get pretty well involved on the constitutionality under the First Amendment of this type of statute.

Now, whether there is any sound basis ultimately in the mind of the Supreme Court, I don't know. But in any event, it's before the Supreme Court in one case and undoubtedly they will also have this case to consider.

Judge Bone: Well, judging from the past action, if this case is promptly filed, they will withhold judgment in this case and decide both of them at the same time.

Mr. Collett: Well, I don't know that.

Judge Bone: I have seen that done frequently.

Mr. Collett: Could be.

Judge Bone: We have a case pending in my court now in which we are doing the very same thing. We should not permit ourselves to get off on the wrong foot with two cases coming up in two district courts here when we can decide both of them in one case, and at least partially eliminate some of the litigation.

Judge Wollenberg: I take it the matter is submitted?

Mr. Collett: I take it the matter is submitted, yes.

Judge Zirpoli: What time did you want to file [fol. 324] briefs?

Mr. Collett: So long as this is it, now, the Department requested that I ask the court for 60 days to respond to all this material. Now, whether or not that's a reasonable request in view of what the court has just said and Mr. Blease's intention, I am not sure. But I would ask for at least 30 days.

Mr. Blease: May I suggest, it took me two days to read the hearing and prepare the memorandum on the evidence.

Judge Bone: How about the docket of the Supreme Court? Are you gentlemen well aware of the procedure up there, to know what it might do if we introduced this delay into the case?

Mr. Collett: Well, I mean, introduce the delay . . .

Judge Wollenberg: I think we should try to get it in as expeditiously as possible, don't you?

Judge Bone: We are desirous of expediting it.

Judge Zirpoli: Mr. Collett obviously wants to file some brief on behalf of the Government.

Judge Wollenberg: Oh, yes.

Judge Zirpoli: What is a reasonable time for you to get this in, Mr. Collett? That seems to be the problem now. You have asked for 60 days. I think that you yourself [fol. 325] have recognized that 60 days, in the light of the posture of the case, is unreasonable.

Mr. Collett: Well, I think it is. I am just saying that the Department, of course, ultimately is going to have the responsibility of this case. There is a motion for summary judgment before the court.

Judge Wollenberg: They have had the benefit of two other cases. Could you get this in in about two weeks?

Mr. Collett: Well, whatever the court says. I will pass that word on. There is a motion for summary judgment in which there is a large number of cases that are cited there, and I don't know that there are any additional cases necessary to be presented, but there is a number of things with regard to the memorandum on the evidence and on this legislative history which I think will call for a response. I think that that doesn't exactly get the correct posture, and with regard to the evidence, I think it will call for some comment.

Judge Bone: Well, your office in Washington ought to have a very complete record on it.

Mr. Collett: That's right. I am sure they do.

Judge Wollenberg: Let's put it down for the 8th, and if it is impossible, they can make application to one of us and we can act.

Mr. Collett: That's agreeable.

[fol. 326] Judge Zirpoli: Yes, that's all right. For the filing of the brief and submission on September 8th. No, October the 8th.

Judge Bone: I think that will probably hustle things along in Washington.

Mr. Collett: Yes, I think probably we can hustle along on that basis.

Judge Wollenberg: You may want to reserve time to respond, Mr. Blease? Or is this submission—

Mr. Blease: Well, let me make that decision when it is submitted. If time is required, I can assure you that it will take no longer than two days. All these matters are spread in these documents; it's just a question of reading them.

Judge Wollenberg: Well, then in order that we don't continue the formal submission, let's add another week to that, make it October 15th for submission. Your brief is due, then, October 8th, Mr. Collett. Right, gentlemen? And then submission October 15th. If Mr. Blease decides before the 15th not to do anything, he can advise the court and we can order it submitted before the 15th. But at least you have that full week in which to file a brief.

Judge Bone: We can at least try to get away from roadblocks on the way.

Judge Wollenberg: All right.

Mr. Blease: May I just say one word about the [fol. 327] factual posture of this case? Up until this point it has been the position of the Government they were going to avoid meeting the central issues by mooting the case and therefore they have presented virtually no evidence at all; virtually all the evidence has been presented by us in one form or another. We have asserted in our legal argument that the Government does bear burdens, although in the alternative we have attempted to meet the burdens, even assuming that the burdens were reversed. The Government has made no assertions with regard to the purpose of this statute, the alternative or anything else of that nature. We have attempted to counter every conceivable assertion that might be made in that matter, and I believe all that is covered in the—

Judge Zirpoli: Well, do you feel this court must decide, number one, whether we still have a general controversy; number two, if we do, is the statute constitutional; number three, if the statute is constitutional, that should end it and we shouldn't have to be discussing the questions of

the application of the law? If we decide that, it is constitutional, then we can take a look at the question of whether it is unconstitutional in its application.

Judge Wollenberg: Sure. We don't have to go into it, then.

[fol. 328] Mr. Collett: One thing. That *McReynolds* case in New York versus *Christenberry*, the Postmaster and the Postmaster General, I don't think—you may not have copies of that, so I had mimeographed or photocopies made for the court.

Judge Wollenberg: That can be put in the file.

[fol. 329] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

No. 41660

[Title omitted]

ORDER ENJOINING DEFENDANTS—November 17, 1964

Before Bone, Circuit Judge, Wollenberg and Zirpoli,  
District Judges.

Per Curiam

In this action plaintiff seeks to enjoin the enforcement of 39 U.S.C., § 4008, a statute which regulates the mailing of "communist political propaganda", and an order declaring it unconstitutional. This Court was convened pursuant to 28 U.S.C., § 2282, § 2284. Based on the record made at the hearing on the merits and facts established at prior pretrial proceedings before this Court, including the hearing on defendants' motion to dismiss which was denied, we hold that 39 U.S.C., § 4008 is unconstitutional on its face, as it infringes plaintiff's rights under the First Amendment of the Constitution of the United States, and defendants are enjoined from enforcing this statute.

In order to disclose the constitutional infirmities of

[fol. 330] the statute at issue, it is necessary to describe briefly its operation. Upon a determination by the Secretary of the Treasury that unsealed mail originating in a foreign country is "communist political propaganda", as defined in 22 U.S.C., § 611 (j), The Foreign Agents Registration Act of 1938 as amended, the Postmaster General is authorized to detain the mail upon its arrival for delivery in the United States. The addressee may receive the mail if it was sent pursuant to a subscription or it is ascertained by the Postmaster General that the mail is "desired by the addressee". Mail addressed to government agencies, certain educational institutions and mail governed by cultural exchange agreements is excepted from the operation of the statute.

To implement Section 4008 the Postmaster General and the Customs Bureau maintain eleven screening points in the United States for the interception of "communist political propaganda". The Customs Bureau decides which countries' mail is to be screened and examines such mail routed through the eleven screening points to determine whether it falls within the statutory definition. When it is determined that particular mail is to be classified "communist political propaganda", the addressee is mailed POD Form 2153-X identifying the mail and advising him that it will be destroyed unless he signifies a desire to receive it by returning the form appropriately marked. The addressee may signify a desire to receive the particular mail being detained or a desire to receive the detained mail and any similar publications. A file of cards is maintained of those individuals requesting delivery in the latter case. Thereafter, upon a determination that mail is "communist political propaganda", it is mailed to the addressee without further inquiry.

[fol. 331] In the instant case plaintiff received, on or about July 12, 1963, a letter from defendant Fixa containing POD Form 2153-X. The card notified plaintiff that the Post Office was holding a piece of unsealed mail matter entitled "A Proposal Concerning the International Communist Movement", which would be destroyed unless plaintiff returned the form appropriately marked within twenty days. Plaintiff refused to sign the card and instead filed this suit. Thereafter, the General Counsel of the Post



Office Department notified plaintiff that the filing of this suit constituted an expression of a desire to receive all mail that was and in the future would be detained under the provisions of Section 4008. In short, contrary to plaintiff's wishes, his name was placed on a list of those people desiring to receive "communist political propaganda".

Initially, defendants argue that this action has been rendered moot by the aforementioned action of the General Counsel of the Post Office. This same defense was raised, successfully, in *Lamont v. Postmaster General of the United States*, 229 F. Supp. 913 (1964). We cannot agree with that distinguished court. Plaintiff's mail is still subject to delay, since mail originating from designated countries must continue to be classified;<sup>1</sup> his name remains on the Postmaster's list of persons desiring to receive communist political propaganda; and there is no guarantee that this list will not be used to his detriment.

To render this case moot under these circumstances is to approve a device which would enable defendants to pre-[fol. 332] vent any potential recipient of mail originating abroad from ever testing the constitutionality of Section 4008. We are not persuaded that the doctrine of mootness requires this result.

It is a well established principle that the "... voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Admittedly, the case may be nevertheless moot if defendant can demonstrate that the alleged wrong will not be repeated. But what is at issue here is by the very nature of the disputed statute a continuing act. Defendants are required by Section 4008 to continue to detain and classify mail which may be addressed to plaintiff in the future. The action of the General Counsel of the Post Office has caused plaintiff's name to be placed on a list which will continue to exist so long

<sup>1</sup> The *Lamont* court assumed, presumably on the record before it, that once the government agreed no longer to detain the plaintiff's mail, there would be "unimpeded delivery". *Id.* at 916. The record herein is clearly to the contrary.



as the statute is enforceable. These are the very practices which are at issue here, and plaintiff is entitled to have the legality of these practices litigated. See *United States v. W. T. Grant Co.*, *supra*, 632-633.

Furthermore, we think contrary to the court in *Lamont* that plaintiff may also assert the rights of third parties. Generally, a person cannot assert the constitutional rights of others. But this is merely a rule of practice which will not be applied where the fundamental constitutional rights of third parties may be denied and it would be difficult for the persons whose rights are asserted to maintain a suit in their own right. See *Barrows v. Jackson*, 346 U.S. 249, 255-257 (1953). Here, persons interested in receiving political matter from abroad may be deterred from bringing suit to challenge Section 4008, lest this be construed as an [fol. 333] expression of a desire to receive "communist political propaganda". The social stigma and economic injury they may suffer is very real. We do not think a person should be made to suffer social disapprobation in order to assert his constitutional rights.

Having satisfied ourselves that this action is not moot and that plaintiff has standing to sue, both in his own right and as a representative of third parties, we now turn to the constitutional issue.

The Constitution, Article I, Section 8, invests Congress with the power to regulate the postal system. See also *Ex parte Jackson*, 96 U.S. 727 (1877). But it is axiomatic that this power is not absolute and unfettered. Congressional power in this area is limited and conditioned by other provisions of the Constitution. Thus "... Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional". *Speiser v. Randall*, 357 U.S. 513, 518 (1958). See also *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 155-156 (1946). The apparent conflict between congressional power to regulate the postal system and its impotence to enact postal legislation which tends to inhibit or deter the exercise of First Amendment rights must be resolved by balancing legitimate legislative purposes served by the statute against the restrictions imposed on rights otherwise guaranteed by the First Amendment. See e.g. *Dennis v. United States*, 341 U.S. 494, 510 (1951); *Schneider v. State*, 308 U.S. 147 (1939).

In striking this balance we are mindful that First Amendment rights are not absolute, but it is too late in the day to doubt the preferred status these rights enjoy [fol. 334] in our constitutional scheme. See *Sherbert v. Verner*, 374 U.S. 398 (1963). The reasons for this preferred status were carefully explained by the Supreme Court in *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940):

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

In a recent elaboration of the so-called balancing test, the Supreme Court has indicated that only a compelling state interest could tip the scale in favor of a statute which burdens the exercise of First Amendment rights. See *Sherbert v. Verner*, 374 U.S. 398, 406. Moreover, even if a compelling state interest were shown, the burden remains on the state "... to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Sherbert v. Verner*, *supra*, at 407. With these considerations in mind, we turn now to the case at bar.

What injuries have been suffered by plaintiff? He asserts that his mail is subject to unnecessary delay because of the screening program made necessary by Section 4008. Whether this delay alone constitutes an unconstitutional abridgment of plaintiff's First Amendment rights, we need not decide. A more serious obstacle to the exercise of these rights arises out of the statute's requirement that the addressee of "communist political propaganda" indicate a "desire" to receive it. Apparently, the statute

[fol. 335] contemplates that once an addressee has manifested this desire to receive such mail, future "communist political propaganda", after it has been so classified, will not be further detained. This requires, of course, that the Post Office maintain a list of persons indicating a desire to receive this type of mail. The statute does not itself provide for such a list, but it is difficult to see how the program could operate otherwise. Indeed, the Post Office has initiated just such a procedure in the instant case. See also *Lamont v. Postmaster General of the United States*, *supra*, at 916. At a minimum plaintiff is required by the statute to disclose a desire to receive communist political propaganda.

The right to distribute and receive controversial literature may require constitutional protection where disclosure may subject the distributor or recipient to social disapprobation or economic injury. In *Talley v. California*, 362 U.S. 60 (1960), the Supreme Court had before it an ordinance requiring that handbills show the name of the distributor. The Court said: "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression", *Talley v. California*, *supra*, at 64. If identification of a distributor is constitutionally impermissible, a fortiori, identification of a recipient, whose rights are similarly protected [see *Martin v. Struthers*, 319 U.S. 141 (1943)], would no less "tend to restrict ... freedom of expression".

That a person may be reluctant to disclose his desires under the circumstances of this case is not fanciful. Similar lists under earlier non-statutory screening programs [fol. 336] were routinely turned over to the House Committee on Un-American Activities. See Hearings before the House Committee on Un-American Activities, 85th Congress, 2d session, p. 2794 (1958). Assurances by defendant that these practices have been discontinued cannot be reasonably expected to mitigate a person's reluctance to have his name associated with "communist political propaganda". There are no similar assurances that this information will not be made available in the future in view of the lack of a statutory requirement that information received pursuant to Section 4008 remain confidential.

Moreover, the practices made necessary by Section 4008,

we are convinced, cannot help but deter the free expression of ideas. It is a fact that people who associate themselves in whatever fashion with anything "communist" are very likely to suffer social disapprobation. See Judge Feinberg's dissenting opinion in *Lamont v. Postmaster General of the United States*, *supra*, at 921.

A reading of the legislative history<sup>2</sup> makes it abundantly clear that the purpose of the new legislation was primarily to control, restrict and prevent the delivery of matter found to be communist propaganda, an infringement upon the dissemination of ideas, and, therefore, a clear and direct invasion of First Amendment territory. To overcome this infirmity in the statute the government must assert and prove both that there is a compelling state interest and that no alternative remedy would [fol. 337] achieve the end desired without infringement. *Sherbert v. Verner*, *supra*, at 406-407. This the government has failed to do, for its alleged state interests, while "compelling" in theory, are insubstantial, illusory in fact and ignore available alternatives. They are clearly incompatible with the requirements of a free society.

The defendants have asserted as the purpose of Section 4008 that "the statute is designed to permit the non-delivery of large quantities of unsealed mail matter determined to be communist political propaganda which most people do not want to receive and which they should not be required to receive against their wishes" (emphasis added). In *Martin v. Struthers*, 319 U.S. 141 (1943), the Supreme Court held unconstitutional a handbill statute whose asserted purpose was to protect householders from annoyance and intrusion. The Court said:

Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time

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<sup>2</sup>"Postal Rate Revision of 1962", Hearings before the Senate Committee on Post Office and Civil Service, 87th Congress, 2d Session (1962); "Exclusion of Communist Political Propaganda From The U.S. Mails", Hearings before the House Committee on Post Office and Civil Service, 88th Congress, 1st Session (1963).



and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors; that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas. (Id. at 146-147).

Even if this asserted purpose were to be found compelling, there is a readily available alternative which would protect the recipient's interest without infringing upon the free expression of others. The Federal regulations [39 C.F.R. 44.1(a)] provide that any person may authorize the postmaster to withhold the delivery of specifically described classes of foreign printed matter and to substitute his judgment as to classification for that of the addressee.

[fol. 338] Another purpose asserted for Section 4008 is that it is designed to avoid a taxpayer's subsidy for the delivery of communist political propaganda. Assuming that this purpose is other than an ill-concealed assertion of the right of the government to control, via the postal rates (see *Hannegan, supra*), certain political ideas which would run afoul of the First Amendment, it is evident that Section 4008 as applied does not and cannot accomplish this purpose. The evidence clearly shows that the administration of Section 4008 is far more costly than the direct delivery of the mail. In short, the statute imposes on the taxpayer an even greater subsidy. In any case, the taxpayer qua taxpayer does not pay for any portion of foreign mail sent from or received in this country. The government is authorized to adjust foreign mail rates so as to avoid any net cost to the taxpayer. See 39 U.S.C. § 505.

Finally, the government asserts in its trial brief that Section 4008 fulfills some objective of foreign policy or national security. No such purpose has been proved. The program instituted by Section 4008 is substantially the same as the administrative program discontinued by President Kennedy on March 17, 1961 after consideration of the national interest in foreign policy and national security. The legislative history reveals that except for minor dif-

ferences Section 4008 in effect reconstituted the discontinued program.

For the foregoing reasons this Court is satisfied that the asserted purposes of Section 4008 do not and cannot justify the burden placed on the First Amendment rights of plaintiff and members of the class he represents, and, therefore, we are compelled to declare the statute unconstitutional on its face.

[fol. 339] The Court having found that Section 4008 of 39 U.S.C. is unconstitutional on its face, hereby orders that the defendants, their agents and employees be and they are hereby enjoined from executing or enforcing the provisions of the aforesaid statute. Plaintiff shall prepare and submit an appropriate order.

Dated: November 17, 1964.

Homer T. Bone, United States Circuit Judge, Arthur C. Wollenberg, United States District Judge, Alfonso J. Zirpoli, United States District Judge.

[fol. 340] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

LEIF HEILBERG, Plaintiff,

vs.

JOHN F. FIXA, et al, Defendants.

JUDGMENT AND ORDER OF COURT—November 25, 1964

This Court, convened under the provisions of 28 U.S.C. 2282, 2284 to consider the constitutionality of 39 U.S.C. 4008, has filed its opinion holding Section 4008 unconstitutional.

Now, therefore, and pursuant thereto, It Is Declared that 39 U.S.C. 4008 is unconstitutional because it infringes plaintiff's rights under the First Amendment of the Constitution of the United States of America; and



It Is Ordered that each of the named defendants, their agents and employees are enjoined from enforcing or executing the provisions of 39 U.S.C. 4008.

It Is Further Ordered that plaintiff and all other persons have the right to receive and shall have delivered to them any and all mail addressed to them in the regular course of the post without said mail being processed pursuant to the provisions of 39 U.S.C. 4008.

11/25/64—300 to Collett, U.S.A.—2 copies to plaintiff's counsel and copies to Judges Bone, Wollenberg, and Zirpoli. [fol. 341] It Is Further Ordered that the defendants, and each of them, are enjoined from disclosing to any person or persons, or any agency or department of government, any and all lists, cards, or other documents, and any and all copies thereof, in the possession, custody or control of said defendants, or their agents or employees, which contain the names of addressees whom the Postmaster General of the United States, his agents or employees, have ascertained desired to receive mail classified pursuant to the provisions of 39 U.S.C. 4008.

Dated: November 25th, 1964.

Homer T. Bone, United States Circuit Judge, Arthur C. Wollenberg, United States District Judge, Alfonso J. Zirpoli, United States District Judge.

[fol. 342] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

[Title omitted]

DEFENDANTS' MOTION FOR ORDER STAYING ENFORCEMENT  
OF FINAL JUDGMENT—Filed November 25, 1964

Come now the defendants by their attorneys and respectfully move this Honorable Court, pursuant to Rule 62(c), (d) and (e), of the Federal Rules of Civil Procedure, to issue an Order staying enforcement of the final

Judgment made and entered herein, November 25, 1964, holding unconstitutional 39 USC 4008, during the thirty (30) day period in which an appeal may be taken and, if an appeal be taken from said Judgment, during the pendency of such appeal.

Dated: November 25, 1964.

Cecil F. Poole, United States Attorney. By: /s/  
Charles Elmer Collett, Assistant United States  
Attorney, Attorneys for Defendants.

[fol. 343] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 41660

LEIF HEILBERG, Plaintiff,

vs.

JOHN F. FIXA, et al, Defendants.

ORDER STAYING EXECUTION OF JUDGMENT AND ORDER OF  
COURT—November 25, 1964

Upon application of counsel for defendants, and good cause appearing therefor, It Is Ordered that the judgment and order of this Court in the above cause is hereby stayed pending the filing, consideration and final disposition by the Supreme Court of the United States of any direct appeal to said Court to be made by the defendants herein, provided such appeal is filed in the Office of the Clerk of the Supreme Court of the United States on or before December 17, 1964.

Dated: November 25, 1964.

Homer T. Bone, United States Circuit Judge, Albert  
C. Wollenberg, United States District Judge, Al-  
fonso J. Zirpoli, United States District Judge.

11/25 copies sent.

[fol. 344] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil No. 41660

LEIF HEILBERG, Plaintiff,

v.

JOHN F. FIXA, individually and as Postmaster, San Francisco, California; JOHN A. GRONOUSKI, individually and as Postmaster General of the United States; GEORGE BROKAW, individually and as Collector of Customs, San Francisco, California; DOUGLAS DILLON, individually and as Secretary of the Treasury of the United States, Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE  
UNITED STATES—Filed December 17, 1964

I

Notice Is Hereby Given that the defendants above named hereby appeal to the Supreme Court of the United States from the final Judgment and Order of Court, of the Three-Judge District Court, entered on November 25, 1964, holding that 39 U.S.C. § 4008 is unconstitutional, and enjoining the defendants from enforcing it:

This Appeal is taken pursuant to 28 U.S.C. § 1253.

II

The Clerk will please prepare a transcript of the appeal record of this cause, including this Notice of Appeal, for transmission to the Clerk of the Supreme Court of the United States.

[fol. 345]

III

The following questions are presented by this appeal:

1. Whether plaintiff's claim was moot.
2. Whether plaintiff had standing to challenge the constitutionality of 39 U.S.C. § 4008.

3. Whether 39 U.S.C. § 4008 is unconstitutional on its face, or as applied.

Dated: December 17, 1964.

J. Walter Yeagley, Assistant Attorney General,  
Kevin T. Maroney, Chief, Appeals and Research  
Section, Internal Security Division. /s/ Cecil F.  
Poole, United States Attorney. /s/ Charles El-  
mer Collett, Assistant United States Attorney,  
Attorneys for the Defendants.

[fol. 346]. PROOF OF SERVICE (omitted in printing.)

[fols. 347-348] Clerk's Certificate to foregoing transcript  
omitted in printing.

[fol. 349] SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1964

No. 848

JOHN F. FIXA, Individually and as Postmaster, San  
Francisco, California, et al., Appellants,

v.

LEIF HEILBERG

Appeal from the United States District Court for  
the Northern District of California

ORDER NOTING PROBABLE JURISDICTION—February 1, 1965

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar. This case is set for oral argument immediately following No. 491, which case is likewise placed on the summary calendar.

Mr. Justice White took no part in the consideration or decision of this case.